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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 567.

SPIELMAN MOTOR SALES COMPANY, *Appellant*,

vs.

WILLIAM C. DODGE, District Attorney, *Appellee*.

BRIEF OF APPELLEE.

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March 6, 1935.

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IN THE

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OCTOBER TERM, 1934.

No. 567.

SPIELMAN MOTOR SALES COMPANY, *Appellant*,

vs.

WILLIAM C. DODGE, District Attorney, *Appellee*.

BRIEF OF APPELLEE.

The opinion of the statutory court of three judges (R. 264-273) is reported in 8 Fed. Supp. 437. The case is before this Court on direct appeal of the complainant below pursuant to U. S. Code, Title 28, Section 380 (Judicial Code Section 266). Probable jurisdiction was noted December 10, 1934.

STATEMENT OF THE CASE.

Proceedings in the Lower Court.

The appellant herein filed a bill of complaint (R. 4) in the District Court of the United States for the Southern District of New York against William C. Dodge, the duly

elected District Attorney for the County of New York, seeking to enjoin the enforcement of the provisions of the Code of Fair Competition for the Motor Vehicle Retailing Trade by prosecuting appellant for violation of the fair trade practice provisions contained in Article IV of the Code. This being an attempt to enjoin enforcement of the Code as a regulation under State authority, a statutory court of three judges was convened to hear the application for preliminary injunction. (R. 66.) A motion to dismiss the bill of complaint was filed by the defendant (R. 263). Affidavits in support of (R. 37-66; 140-218) and in opposition to (R. 67-139; 218-263) the motion for preliminary injunction were filed.

After a hearing, the Court rendered an opinion holding that the motion for preliminary injunction should be denied (R. 264-73) and on October 18, 1934, entered an order denying the motion for preliminary injunction and dismissing the bill of complaint (R. 273-74).

Following the order allowing the appeal herein, entered November 13, 1934 (R. 274), the parties stipulated (R. (S) 2) that the hearing on the application for preliminary injunction and on the motion to dismiss the bill of complaint might be considered a final hearing on the merits with the affidavits accepted as the evidence on final hearing (*Hines Trustees v. United States*, 263 U. S. 143) and that findings of fact and conclusions of law be submitted to the statutory court for entry pursuant to Equity Rule 70½, same to be entered *nunc pro tunc* as of a date immediately prior to the final decree. The statutory court entered an order pursuant to the terms of the stipulation (R. (S) 1) and formal findings of fact and conclusions of law were forwarded by the Clerk of the lower court for incorporation with the record on this appeal. The case is now before this Court on an appeal from a decision dismissing the bill of complaint, as on final hearing.

STATUTES AND CODE PROVISIONS INVOLVED.

The statutes involved are:

1. The National Industrial Recovery Act, approved June 16, 1933, c. 90, 48 Stat. 195, U. S. C. Title 15, Section 701.

2. Chapter 781, Laws of 1933 of State of New York, effective August 26, 1933 (R. 33).

Copies of the pertinent sections of these statutes together with certain executive orders are set forth in Appendices A, B, C*. (Vol. 2, pp. 1, 10, 15) The provisions of the Code of Fair Competition for the Motor Vehicle Retailing Trade appear in the Record. (R. 19-33.)

These statutes and the codes of fair competition therein contemplated provide for a general regulation of industrial and commercial activity. The National Industrial Recovery Act is entitled "An Act to encourage National Industrial Recovery, to Foster Fair Competition, and to Provide for the Construction of Certain Useful Public Works, and for Other Purposes". Section 1 of the Act contains a declaration of National emergency and a declaration of policy designed to promote increased industrial and commercial activity, to reduce unemployment, eliminate unfair competitive practices and to bring about recovery throughout the Nation. One of the means provided by the Act to accomplish these ends was the provision for the establishment or promulgation of codes of fair competition, which the President was authorized to approve upon the application of a trade association or group representative of such trade or industry, and upon the making of certain findings therein specified including the finding that such code would tend to effectuate the policy of the Act.

Section 3 (b) of the Recovery Act, declared that the provisions of a code so approved should be the standards of fair competition for the trade or industry and that any violation of such standards "in any transaction in or affecting

*The Appendices herein referred to are printed in a separate volume filed herewith and designated Vol. 2.

interstate commerce" should be deemed an unfair method of competition in commerce within the meaning of the Federal Trade Commission Act. The several district courts of the United States were vested with jurisdiction in equity to restrain violations of any code so approved and any violation of the provisions of such codes "in any transaction in or affecting interstate or foreign commerce" was made a misdemeanor, punishable by a fine of not more than $500.00 for each offense.

The State Act of New York contained a similar declaration of emergency and a declaration of policy to cooperate in the furtherance of the objects and purposes declared in the Federal statute and to make uniform the standards of fair competition prevailing in intrastate commerce and industry with those of interstate commerce required by the provisions of the National Act. It was further provided that codes approved under the National Act might be filed with the Secretary of State of New York and upon such filing the Code should be the standard of fair competition for the particular trade or industry in the State of New York as to transactions intrastate in character. Any violation of the provisions of such a Code as adopted by the State of New York was made a misdemeanor punishable by a fine of not more than $500.00 for each offense and the State courts were vested with jurisdiction to restrain violations of such codes as to intrastate transactions.

Both the Federal and State Acts contain provisions exempting from the provisions of the respective Federal and State Anti-Trust Laws the codes so approved and any actions of persons in complying with the provisions thereof while such codes were in effect (Section 5 of the Federal Act and Section 5 of the State Act). The statutes authorized and encouraged cooperative action by trade and industrial groups of a character previously forbidden by the Anti-Trust Laws.

The State Act was expressly designed to cooperate with

and supplement the Federal Recovery legislation and to provide for uniformity of legislative and administrative policy in the fields of State and Federal regulation.

The Code of Fair Competition for the Motor Vehicle Retailing Trade (R. 16-33) was approved by the President on October 3, 1933, pursuant to Section 3 (a) of the National Industrial Recovery Act. After being so approved, the Code was filed with the Secretary of State of New York (R. 9; R. (S) 14-15) in accordance with the provisions contained in the New York Act. The Code provides for the regulation of Motor Vehicle Retail dealers. Article I of the Code contains the statement of purposes. Article II contains definitions. (The appellant was a dealer engaged in the business of motor vehicle retailing as therein defined.) (R. (S) 13.) Article III contains regulations governing employment of labor including minimum wages and maximum hours. Article IV contains trade regulations including a limitation of the maximum trade-in allowance which a dealer may give in the sale of a new motor vehicle to a customer who trades in a used car in such transaction and the requirement for the maintenance of factory list prices, with a prohibition against discounts, gratuities, commissions or other means of rebating a part of such list price.

The other articles of the Code provide for administrative machinery and contain general provisions required by the Act or by the administrative regulations.

Appellant's attack is directed at the trade practice regulations of Article IV above described. No question of the validity or application of the labor provisions of the Code is here involved.

The appellant attacks the fair trade practice provisions of the Code above mentioned and the respective State and Federal statutes as being in contravention of the Federal and State Constitutions. It is also charged that these trade practice provisions of the Code are not authorized by the statute.

SUMMARY OF ARGUMENT.

POINT I. The economic emergency which dominated and altered the Nation's competitive system made imperative the adoption of comprehensive legislation to rehabilitate trade and industry. (pp. 13-20)

A. The economic condition of the United States at the time of the enactment of the recovery legislation was serious. Overproduction had produced competitive abuses which demanded action to prevent the collapse of industry.

Atchison Railway Co. v. U. S., 284 U. S. 248, 260.
Home Building & Loan Association v. Blaisdell, 290 U. S. 398.

B. The effect of the depression and competitive abuses upon the automotive industry and the Motor Vehicle Retailing Trade threatened their very existence.

POINT II. The Recovery Acts and the Code meet all requirements of the Federal Constitution. (pp. 21-49)

A. The Acts and the Code of Fair Competition for the Motor Vehicle Retailing Trade, fulfill the requirements of the Fifth and Fourteenth Amendments.

1. The legislative purpose of the Acts was to preserve the economic system by substituting group action for cutthroat competition in the course of a normal development of governmental regulation of competitive practices.

The President's Message to Congress.
National Recovery Act (Sec. 1).
New York State Act (Sec. 1).
Legislative History (Appendices D and E, Vol. 2, pp. 28, 50).

A proper exercise of the legislative function is the determination of the particular policy deemed appropriate to regulate commerce or trade within the legislative jurisdiction.

Northern Securities Co. v. U. S. 193 U. S. 197, 337.
Nebbia v. New York, 291 U. S. 502.

2. The regulations provided by the Motor Vehicle Retailing Code are reasonable and tend to eliminate the competitive abuses that undermine the trade.

Enforcement provisions under the Federal and State Acts relate only to interstate and intrastate commerce, respectively.

Appellant's attack is primarily directed against the fair trade practice provisions of Article IV of the Code.

The trade practice provisions of Article IV, relating to the price of new cars and trade-in allowances for used cars are reasonable and appropriate measures for this Trade.

Nebbia v. New York, supra.

3. The provisions of the Code are not price fixing of the character condemned by certain decisions prior to the *Nebbia* case.

Tyson v. Banton, 273 U. S. 418, 429.
Williams v. Standard Oil Co., 278 U. S. 235.
Ribnik v. McBride, 277 U. S. 350.

These code provisions fall within the category of reasonable regulations of methods of competition which have heretofore been upheld.

U. S. v. Joint Traffic Bureau, 171 U. S. 504, 572.
Rast v. Van Deman and Lewis, 240 U. S. 342.

Tanner v. Little, 240 U. S. 369.
Central Lumber Co. v. South Dakota, 226 U. S. 157.
Merrick v. Halsey Company, 242 U. S. 568.
Aikens v. Wisconsin, 195 U. S. 194.
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American Can Company v. Ladoga Canning Co., 44 Fed. (2d) 763.
Porto Rico American Tobacco Co. v. American Tobacco Company, 30 Fed. (2d) 234.
Royal Baking Powder Co. v. Federal Trade Commission, 281 Fed. 744.
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Federal Trade Commission v. Noma Electric Corporation, 15 F. T. C. 87.
Federal Trade Commission v. Oakes Company, 3 F. T. C. 35.
Federal Trade Commission v. Fleischman Yeast Co., 1 F. T. C. 119.

4. The procedural requirements of due process of law are satisfied.

Assigned Car Cases, 274 U. S. 564, 583.
Norwegian Nitrogen Company v. U. S., 288 U. S. 274, 317-19.
See detailed discussion under Point III of Brief, *infra*, pp. 49-55.

5. The appellant has not sustained any damage which would entitle him to the relief sought.

Finding of the Court below (R. (S) 25).
Hegeman Farms Corp. v. Baldwin, 293 U. S. 163, 170-171.

There is no merit in the claim of damage to others not motor vehicle dealers.

Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 576.
Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 544-45.

There has been no denial of equal protection of the laws.

Nebbia v. New York, supra, at p. 521.

6. It appears that the statutes and Code provisions are reasonable and are well adapted to accomplish the end sought. The statutes and the Code fulfill all the requirements of due process.

Adams v. Tanner, 244 U. S. 590.
Booth v. Illinois, 184 U. S. 425.
McLean v. Arkansas, 211 U. S. 539.
Wilson v. New, 243 U. S. 332.

B. Congress may regulate all transactions in or affecting Interstate Commerce and the National Recovery Act goes no further.

Brooks v. United States, 267 U. S. 432, 438.
Hammer v. Dagenhart, 247 U. S. 251.
Swift & Co. v. U. S., 196 U. S. 375, 398.

C. The delegation of power made by the National Recovery Act is consistent with Constitutional requirements.

1. The necessity of legislative standards for administrative guidance.

Panama Refining Co. v. Ryan, ... U. S. ..., Jan. 7, 1935.

2. The Act enumerates the objects to be attained (Sec. 1) and sets up definite standards to guide the President. (Sec. 3 (a)).

These standards are fully equal to those in the Federal Trade Commission Act, Interstate Commerce Act, and others.

Federal Trade Commission v. Gratz, 253 U. S. 421.
Federal Trade Commission v. Keppel & Bro., 291 U. S. 304.

New York Central Securities Corporation v. United States, 287 U. S. 12.
Avent v. United States, 266 U. S. 127, 130.
United States v. Chemical Foundation, 272 U. S. 1, 12.
Radio Commission v. Nelson Brothers Company, 289 U. S. 266, 285.

D. The definiteness and certainty required in the definition of crimes are fully satisfied.

Champlin Ref. Co. v. Commission, 286 U. S. 210.
Avent v. U. S., 266 U. S. 127.
U. S. v. Grimaud, 220 U. S. 507, 522-23.

POINT III. The Motor Vehicle Retailing Code meets all Requirements of the statutes. (pp. 49-69)

A. The procedure in adoption and approval of the Code was in accordance with the statute.

1. Adequate notice was given of the hearing which preceded the adoption of the Code and full opportunity was afforded all those interested to appear and present their views.

2. The requisite findings were made by the President.

3. The appellant has failed to resort to its administrative remedy of seeking modification of or exemption from the Code which it should have sought prior to bringing a suit for injunction.

Hegeman Farms Corp. v. Baldwin, supra, p. 172.
Peterson Baking Co. v. Bryan, 290 U. S. 570, 575-76.
U. S. v. Illinois Central, 291 U. S. 457, 463, 465.
Porter v. Investors Syndicate, 286 U. S. 461, 470, 71.

B. The trade practice provisions of the Motor Vehicle Code comply with the terms of the statute.

1. The term "unfair competitive practices" embraces a broad field. This is shown by the legislative history of the act.

Fed. Trade Com. v. Keppel & Bro., 291 U. S. 304, 310.
Congressional Record, Vol. 77, pp. 4218-19.

2. In construing the term "Codes of fair competition", reference should be had to prior codes approved by the Federal Trade Commission in connection with trade practice conferences.

Annual Reports of Federal Trade Commission and other publications of the Commission, as cited.

3. The terms of the Recovery Act have a broader meaning than those of the Federal Trade Commission Act and authorize all of the trade practice provisions of Article IV of the Code, even though they be considered price regulations.

Sections 3 (a) and 3 (b) and records and reports above cited under Points B 1 and 2.

4. Code provisions are permitted by the Recovery Act even though considered price regulations.

C. The provisions of the Code do not violate the statutory prohibition of Sec. 3 (a) against monopoly and monopolistic practices.

Appalachian Coals v. U. S., 288 U. S. 344.
Appendix D, Vol. 2, pp. 28-49.

POINT IV. The State statute and the Code do not violate the Constitution of the State of New York. (pp. 69-73)

A. The constitutionality of the State Act has not been passed upon by the highest court of New York but

has uniformly been sustained by the appellate division.

Gross v. Jamaica Auction Galleries, 242 App. Div. 658.
Sherman v. Abeles, 241 App. Div. 676.
Sabatini v. Andrews, 276 N. Y. S. 502.

B. The final determination of whether the statute is in accordance with the State Constitution must be made by the highest court of New York and this Court has frequently stated its reluctance to pass upon such questions in advance of that determination.

Pelton v. National Bank, 101 U. S. 143.
Railroad v. Jarrett, 231 U. S. 298.
Terrace v. Thompson, 263 U. S. 197.
Porter v. Investors Syndicate, 287 U. S. 346.
Carstairs v. Cochran, 193 U. S. 10.

C. The New York cases cited by appellant are not applicable.

The Recovery legislation has been sustained in many lower court decisions including some sixty cases with reference to the Motor Vehicle Code, in the New York courts of original jurisdiction.

POINT I.

THE ECONOMIC EMERGENCY WHICH DOMINATED AND ALTERED THE NATION'S COMPETITIVE SYSTEM MADE IMPERATIVE THE ADOPTION OF COMPREHENSIVE LEGISLATION TO REHABILITATE TRADE AND INDUSTRY.

A. The Economic Condition of the United States at the Time of the Enactment of the Recovery Legislation.

The Federal and State Statutes here under attack were enacted at a time of grave emergency in the general economic conditions of the nation and of severe distress in the automotive industry and the motor vehicle retailing trade. (R. (S) 14, 17-20.) A separate point is made of the acute depression, not to justify any claim that past precedent be ignored or that constitutional provisions be distorted; but to show the altered character of the competitive abuses which the legislation was designed to correct and the economic conditions in the light of which the statutes must be construed. A brief statement setting forth with statistical exactness the economic plight of the country is essential to a sound judgment of this legislation.

Unemployment figures at the end of March, 1933, showed a total of 13,689,000 unemployed. Payroll figures for the first quarter of 1933 were 64 per cent less than 1929. (League of Nations World Economic Survey, p. 167) The total number of *persons employed* in factories fell from 101 in 1929 (1923 to 1925 = 100) to 59.4 in February, 1933. The total payrolls dropped even further, from an index number of 107 in 1929 (1923 to 1925 = 100) to 40 in February, 1933. (World Economic Review, pages 101, 102.)

National income showed a reduction from 82 billion dollars in 1929 to 49 billion dollars in 1933, a decline of 40 per cent. In the mining, manufacturing, construction and

transportation industries where wage payments could be segregated from other payments the decline of labor payrolls was from 15 billion dollars to 6 billion dollars, a decline of 60 per cent. The greatest previous decline in national income, since this data was first tabulated in 1909, was in the depression of 1921, when there was a contraction of only 14.4 per cent (Senate Document No. 124—74th Congress, 2nd Session, National Income 1929-1932, pp. 10, 14, as revised January, 1934, by Division of Economic Research, U. S. Department of Commerce).

Freight car loadings fell from an index number of 106 (1923 to 1925 = 100) for 1929 to 54 in February, 1933. The actual decrease was from 3,766,000 cars in February, 1929, to 1,971,000 in February, 1933. (World Economic Review, pages 115, 116.)

Receipts from foreign investments were reduced from 700 million dollars in 1929 to 308 million dollars in 1933. Loans to foreign borrowers were reduced from a total of 1.3 billion dollars in 1928 to zero in 1933. (World Economic Survey, *supra*, pp. 303, 310)

New capital issues were reduced from a total of 5.5 billion dollars in 1929 to 280 million dollars in 1933. (World Economic Survey, *supra*, p. 335) Total market value of all shares listed on the New York Stock Exchange September 1st, 1929, was 89 billion dollars; total market value on March 1st, 1932, 27.5 billion dollars, a reduction of approximately 68 per cent. Between the peak of March, 1930, and the low point of June, 1933, there was a shrinkage of 1.7 billion dollars in the annual rate of cash dividend payments on 600 common stocks, a reduction of over 60 per cent. (Moody's Weighted Index.)

Agricultural income was reduced from 10.5 billion dollars in 1929 to 4.2 billion dollars in 1932 (Annual Report, Secretary of Agriculture, 1934).

Bank clearings for New York City were reduced from 477.2 billion dollars in 1929 to 157.4 billion dollars in 1933,

for Chicago from 36.7 billion dollars in 1929, to 9.0 billion dollars in 1933.

The index of industrial production stood at 63 in February, 1933, compared with 118 in 1929 (on a base of 100—the average for 1923-25); construction activity had dropped to 19 from 118 in 1929. (World Economic Review 1933 published by Bureau of Foreign and Domestic Commerce, U. S. Department of Commerce, pp. 84, 112.) The general commodity price index fell from 95.3 in 1929 to a low of 59.8 in February, 1933 (Bureau of Labor Statistics, Wholesale Prices December, and Year 1933, page 1.)

These figures indicate clearly and without exaggeration the gravity of the problem faced by the legislative and executive branches of the government.

This Court has taken judicial notice of the depression, saying, "It is the outstanding contemporary fact dominating thought and action throughout the country"' *Atchison, etc., Railway Co. v. U. S.*, 284 U. S. 248, 260, decided January 4th, 1932. *Home Building & Loan Association v. Blaisdell*, 290 U. S. 398. Judicial notice may be taken of the non-record facts above referred to, taken from authoritative publications. *Muller v. Oregon*, 208 U. S. 412, 420.

1929 not only marked the advent of the depression; it punctuated the end of an economic period whose outstanding characteristic had been continuous expansion of production. To this end of ever greater production had been bent the combined efforts of business, science and invention. World wide demand and heightened domestic purchasing power made it appear that no matter how great might be the technological advance in the mechanical process of production and the resultant increase in speed and capacity of production, demand would continue to keep ahead of supply. The dominant principle pursued was high-powered, continuous expansion of the facilities of production. The success of these efforts proved the fallacy of the emphasis placed upon increased production. Overproduction became sharply apparent when foreign market

places closed and domestic consumption was greatly impaired.

The desperate competition to market the over-abundance that could not be consumed, expressed itself through unfair methods of competition of a new character. Price cutting, a minor competitive abuse in the past economic period, was generally adopted by the nation's industries with wages of labor paying the greatest toll. Industry found itself inexorably committed to a descending spiral of price cutting and wage reduction, from which it was helpless to extricate itself. The process of disintegration reached a point of culmination in the compulsory bank holiday on March 6th, 1933, in the course of which every financial and banking institution was compelled to close its doors.

The contraction of business activity as the depression continued and the resulting shrinkage of consumption threw competition completely out of balance. Competition among buyers to acquire commodities, which normally counterbalances the competition among sellers to dispose of commodities, almost wholly disappeared. Excess productive capacity was apparent in practically every industry and in the case of many products overhanging surpluses of a burdensome character were in evidence. Such conditions existed throughout the nation in practically every industry and trade. Each business unit was under a driving force to obtain the largest possible share of diminishing demand in order to dispose of its surpluses and keep down its overhead. In an effort to keep going, both in the interest of himself and his employees, an employer would resort to price cutting in order to increase his volume. But every employer was under the same pressure and necessarily followed the same course. No one got any result. There was merely a wholly futile and destructive struggle. Ruthless price cutting ensued. Wages were forced down. Working capital was impaired. Credit dried up. There were no funds and no confidence for undertaking replacements, im-

provements or new enterprises. The capital goods industries were almost completely shut down. Buying by dealers was limited to the barest requirements as fear of falling prices and fear of further price cutting by competitors prevented adding to inventories. Consumer buying was in turn checked through falling wages, unemployment, the suspension of dividend and interest payments and even more by the general atmosphere of fear which obscured the outlook and paralyzed the initiative of each individual.

When in the past the equilibrium of the competitive system has been disturbed the Government has prescribed regulations designed to restore a normal balance and correct abuses. In the early part of 1933 the absolute need for such legislation that would assist industry to adjust itself to the radically changed economics and competitive conditions was manifest.

B. The Effect of the Depression and Competitive Abuses Upon the Automotive Industry and Motor Vehicle Retailing Trade.

The automobile industry is one of the largest in the United States and is one upon which many other industries are primarily dependent for their existence. (R. (S) 16) It employs directly and indirectly more than 4 million workers (R. (S) 17), one out of eleven of all persons gainfully employed in this country. The automobile industry ranks first as a consumer of iron and steel, rubber, plate glass, nickel, lead, mohair, upholstery leather and gasoline. (R. (S) 17) It uses approximately 14.5 per cent of all the lumber used in the United States. (R. (S) 17) The industry is divided into two distinct divisions, each an integral part of the other. (R. (S) 17) There is on the one hand the automobile manufacturer who produces new cars and on the other, the motor vehicle retail dealer who is engaged in their sale and distribution at retail. The welfare of the manufacturing industry is necessarily dependent upon the

efficient operation of the retail dealers who market the manufacturers' commodities. The following figures illustrate the effect of the national economic crisis upon the motor vehicle retail trade:

Employed 1929	427,459
Employed 1932	229,800
Wages paid 1929	$775,000,000
Wages paid 1932	$283,000,000
New cars sold 1929	5,600,000
New cars sold 1932	1,400,000
Value new cars sold 1929	$3,500,000,000
Value new cars sold 1932	$793,000,000

(R. (S) 19-20)

Between 1929 and 1932 there was a drop of approximately 75 per cent both in volume of business and value of sales. (R. (S) 18-19)

During the same period the average hourly rate of wage for employees had dropped approximately 47 per cent. (R. (S) 19)

The manufacturers in the automotive industry and the dealers in the Motor Vehicle Retailing Trade were thus subject to the same pressing forces which resulted in cut-throat competition throughout all trade and industry. In the effort to survive, price cutting, wage reductions, reduced volume, impairment of working capital, and stagnation in replacements and improvements followed one another in never ending succession. In the Motor Vehicle Retailing Trade, this struggle developed competitive abuses similar in general character to those common to all industry and trade as well as evils peculiar to this particular trade.

In the automotive industry, it has long been the practice for the manufacturers to establish, publish and control prices on new cars and retail motor vehicle dealers are compelled through contractual arrangements to respect the sales prices set by the manufacturers (R. (S) 25), or lose

their franchises. However, with the intense competition as a consequence of the reduced volume of sales and declining purchasing power of the consuming public it was inevitable that unreasonable and unwarranted discounts or rebates below manufacturer's list prices were resorted to in an effort to secure business.

Eighty-five per cent of all sales made by the Motor Vehicle Retailing Trade involve a trade-in allowance on a used car. The most serious competitive abuse occurred in the granting of allowances far in excess of the values of used cars offered in trade as a part of the purchase price for new cars. (R. (S) 17, 18) This trade-in allowance became the medium through which excessive rebates and discounts were allowed and price discrimination as between different customers and cut-throat competition between dealers were practiced. These over-allowances were largely deliberate but in part unintentional. It was often impossible to determine the reasonable value of a used car. No accurate information was available for many models, notwithstanding the fact that there were some Appraisal Books available which gave some information as to values of used cars. Over 5,000 types of used cars are in the hands of the public and no single dealer could possibly have sufficient knowledge to determine the value of each one of these used cars, any one of which might be offered as a trade-in. (R. (S) 21)

With unbridled competition existing among the dealers for the greatly reduced volume of business in new cars, the evil of excessive trade-in allowances on customers' old cars grew to such serious proportions that the very existence of the industry was threatened. The dangerous consequences of this destructive competition had been fully manifested even before the economic depression became a contributing factor, but as the depression progressed this destructive competitive practice was intensified and the evil result aggravated so that this abuse became one of the major factors resulting in the disorganization and disruption of

the industry and caused sharp and drastic reductions of wage and labor standards throughout the trade. (R. (S) 18, 19) It was impossible for individuals or groups to protect themselves against this destructive practice even when large majorities of dealers in a community recognized its evil and its futility. In times of such restricted consumption and low purchasing power as prevailed during the past few years, all are forced to follow the competitive conduct of the few, no matter how impossible it may be for any one to secure any possible advantage by so doing when all follow the destructive practice.

The dealer making excess trade in allowances could only minimize his losses by saddling them upon his employees through the payment of sub standard wages. Otherwise, the entire loss would have to come out of the dealer's capital. This situation resulted in terrific losses to the dealers and in dissipation of their capital. Many were forced out of business; those remaining in business cut wages and greatly reduced the number of employees. By 1933 a large proportion of the automobile dealers in the country were on the verge of insolvency. (R. (S) 19)

To meet these grave conditions in industry generally, including those in the Automotive Industry and the Motor Vehicle Retailing Trade, and to prevent even more disastrous consequences, the National Recovery Act and the supplemental legislation of the State of New York were enacted. Against this background the legal problems occasioned by their enactment and exercise must be measured and determined. The Chairman of the Committee on Ways and Means in presenting the Recovery Act to the House of Representatives characterized it as the keystone in the arch of industrial rehabilitation and recovery favored by industry, agriculture and labor; a measure which charted a middle course between monopoly and the "error of unfair competition which now has a stranglehold upon business." (77 Cong. Rec. p. 4202.)

POINT II.

THE RECOVERY ACTS AND THE CODE MEET ALL REQUIREMENTS OF THE FEDERAL CONSTITUTION.

A. The Acts and the Code of Fair Competition for the Motor Vehicle Retailing Trade, Fulfill the Requirements of the Fifth and Fourteenth Amendments.

The appellant contends that Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade, as a State regulation, and the State Recovery Act which makes it effective, deny it the rights guaranteed by the Fourteenth Amendment. While the Code, as a Federal regulation, is not involved in this suit against a State officer to enjoin the enforcement of a regulation adopted pursuant to a State statute, the appellant charges that the National Industrial Recovery Act is in violation of the Federal Constitution. In view of the fact that the limitations of the Fifth Amendment and the Fourteenth Amendment, in their respective fields, are governed by substantially the same principles, they will be discussed together.

The guarantee of due process requires that the legislation and regulation shall be reasonable and not arbitrary or capricious and that the means selected shall have a real and substantial relation to the ends sought to be attained. The determination of whether these requirements have been met necessitates an examination of the circumstances which occasioned the legislation and of the conditions to which the regulatory measures are applied, which matters have already been reviewed (Point I, *supra*, pp. 13-20). Attention should now be given to the terms of the statutes and to the method employed, namely, the Code of Fair Competition, to remedy the evils existing in the Motor Vehicle Retailing Trade.

Legislative purposes of the statutes.

In requesting the National Recovery Act, the President, in a message submitted to Congress on May 17th, 1933, stated:

> "Before the special session of the Congress adjourns, I recommend two further steps in our national campaign to put people to work.
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> I
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> My first request is that the Congress provide for the machinery necessary for a great cooperative movement throughout all industry in order to obtain wide reemployment, to shorten the working week, to pay a decent wage for the shorter week, and to prevent unfair competition and disastrous overproduction.
>
> Employers cannot do this singly or even in organized groups, because such action increases costs and thus permits cut-throat underselling by selfish competitors unwilling to join in such a public-spirited endeavor."

The Federal Act, approved June 16, 1933, declared the existence of an emergency in the following language:

> "A national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist." (Section 1)

The State Act likewise recognized the same emergency in the State of New York, declaring in Section 1 thereof:

> "A national emergency productive of widespread unemployment and disorganization of industry,which likewise prevails in the State of New York, which burdens intrastate, interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people and of the people of the State of New York, is hereby declared to exist. The

existence in this state of such present acute economic emergency, and the effects and certain causes thereof as declared in section one of title one of the national industrial recovery act, enacted by the congress of the United States, effective June sixteenth, nineteen hundred and thirty-three, are hereby recognized; and it is hereby declared that said emergency, the causes and effects thereof, as so declared, relate as well to commerce in this state wholly intrastate in character as to interstate and foreign commerce and transactions affecting interstate and foreign commerce carried on in this state." (R. 33-34.)

To meet this emergency the purposes of the National Act were stated in the following terms:

"It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanction and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources." (Section 1.)

The State Act adopted the same objectives and expressly declared its purpose to cooperate with the administration of the National Act and to make effective a uniform regulation applicable to intrastate and interstate transactions. This portion of the State Act provided:

"It is hereby declared to be the policy of this state to cooperate in the furtherance of the objects and pur-

poses declared in said act of Congress, and each and every provision of this act shall be construed in accordance with the policy so declared, and to make uniform the standards of fair competition prevailing in intrastate commerce and industry with those of interstate commerce required by the provisions of the said national industrial recovery act which are applicable in interstate commerce in the state of New York." (R. 34.)

Both Statutes exempt Code provisions and group action in compliance therewith from the prohibitions of the respective Federal and State Anti-Trust laws, a recognition that the pressing industrial problems to be met were those of production in excess of consumption and ruthless competition to secure a share of vanishing markets. To this end group action, under adequate control and supervision was substituted for cutthroat competition and was encouraged to the extent that such action did not approach monopoly. Ample evidence that this was the purpose of the legislation is contained in the Congressional proceedings. (Appendices D and E, vol. 2, pp. 28, 50.)

The Legislative purpose of the Recovery Acts is in pursuance of an economic policy differing from that upon which the Anti-Trust Acts have been based. Both sets of legislation relate to the same subject matter in that they pertain to the control of competitive methods and practices.

The tremendous technological advance and great expansion of productive capacity has generated its own category of trade abuses based upon the desperate competition of business to secure as large a portion of a vanishing market as possible. Ruthless competition depending largely upon price cutting and reduction of costs through the sweating of labor, has altered the economic background and has compelled the enactment of new legislation designed to curb and correct present competitive evils. The concept of competition was changed.

It is the function of the legislative branch of the Federal and State Governments to choose between economic theories and determine the particular policy deemed appropriate to regulate the commerce or trade subject to their respective jurisdictions.* *Northern Sec. Co. v. U. S.*, 193 U. S. 197, 337; *Nebbia v. New York*, 291 U. S. 502, 537. There can be no difference in constitutional power where the purpose, as in the Anti-trust Acts, is to protect the public against the evils of unduly high prices and where, as here, the purpose is to protect the manufacturer and dealer and their employees against the evils of unduly depressed earnings. The Recovery Statutes instead of representing an effort to supplant the present (economic) system, represent an effort to preserve the economic system by relieving the tremendous strain that has been placed upon it and by adjusting it to its changed basis. The Recovery Statutes are not a violent experiment but are normal developments of governmental regulation of competitive practices.

Clearly the Federal and State Recovery Acts here under consideration had a proper legislative purpose and the means adopted had a real and substantial relation to the object sought to be attained.

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*Examples of Government intervention to place a roof upon competitive forces are found in the legislation fixing the prices of fuels, *Highland v. Russell Company*, 279 U. S. 254 and the rental cases—*Block v. Hirsh*, 256 U. S. 135; *Marcus Brown Company v. Feldman*, 256 U. S. 170; *Levy Leasing Company v. Siegel*, 258 U. S. 242. A somewhat similar precedent is found in the governmental control of prices exercised during the War with the cooperation of industry through the War Industries Board, (See American Industry in the War—a report of the War Industries Board by Bernard M. Baruch; Government Control Over Prices, History of Prices During the War by Paul Willard Garrett, G. P. O. 1920). The National Recovery legislation is of the character designed to furnish a floor below which competitive price cutting will not be allowed to reach. A recent example of this is the Milk Legislation of the State of New York sustained in *Nebbia v. New York*, 291 U. S. 502, and finds earlier precedents in the legislative activities referred to in that decision.

The regulations provided by the motor vehicle retailing code are reasonable and tend to eliminate the competitive abuses that undermine the trade.

One of the methods employed for accomplishing the objectives of the Statute is that provided in Section 3 (a) of the National Recovery Act authorizing the formulation of Codes of Fair Competition which, when approved by the President, are to be enforced as compulsory regulations in the trade or industry to which they relate. The compulsory enforcement provided by the Federal Act relates only to transactions in or affecting interstate commerce. The State Statute provides that when the Code of Fair Competition is duly filed in accordance with the statutory provisions, it thereupon becomes a standard of fair competition for intrastate commerce and may be enforced in the State Courts. No better means to this end could have been devised than this legislative cooperation between the Congress and the Legislature of the State of New York, as expressed by their respective Recovery Acts.

The immediate question is whether the trade practice provisions of the Code under attack are such as to meet the constitutional requirements here under discussion.

The essence of appellant's attack.

The principal attack upon the Code of Fair Competition by the appellant is directed against Article IV A (R. 40-42) which regulates the maximum allowance that may be made by a dealer on the trade-in of a used car as part payment on the purchase price of a new automobile.

Although the bill of complaint refers to the requirement contained in the Code of Fair Competition prohibiting discounts and rebates in the sale of new automobiles, as set forth in Article IV B (2) (R. 43), this provision is not in issue as is shown by the following findings of fact to which appellant has agreed:

"That prior to the adoption of the Code of Fair Competition for the Motor Vehicle Retailing Trade the Retail Motor Vehicle Dealers were compelled to respect the sales prices established by the manufacturers of new motor vehicles and maintenance of price by automobile manufacturers through contractual agreements with dealers or agents has long existed in the trade.

"The manufacturers of automobiles are not subject to the terms of the Code of Fair Competition for the Motor Vehicle Retailing Trade and each manufacturer has complete control of the price of his product and may increase or lower his price to meet the competitive forces of his fellow manufacturers. The factory-made prices of new cars of different makes are highly competitive.

"The complainant has not set forth or complained of an instance where it endeavored to sell a new Chevrolet automobile openly in competition with other Chevrolet dealers at less than factory established prices" (R. (S) 25).

Code Regulation of Trade-In Allowances.

The history of the automotive industry even prior to 1929 exhibits clearly the intense pressure exerted by the expansion of production, and upon the Motor Vehicle Retail Distributing Trade to market its products. The increasing pressure, confined by contractual arrangements prohibited price cutting on new cars, forced an outlet through trade-in allowances on used cars.

Through the trade-in allowances, upon which are based 85 per cent of all sales of new cars, the industry, seeking to maintain its sales volume in a shattered market and compelled by the force of destructive competition, resorted to drastic price cutting by granting secret rebates and exorbitant discounts in the form of overallowances on used cars. Individually the dealers were helpless. Their vast numbers and widespread locations prevented the possibility of a general effort at self-regulation. Local regulations, seeking by the establishing of maximum hours and minimum wage

rates to curb the destructions of industry, proved ineffectual (R. (S) 20).

In view of the fact that there are more than 5,000 different types of cars (makes, models and years) in the hands of the public (R. (S) 21) it has long been impossible for any single dealer to have a complete knowledge of their constantly changing market value. Before the adoption of the Code, appraisal books based on reports of used car sales, were circulated among dealers as some aid in meeting this problem. These appraisal books had an objective similar to the Guide Books contemplated by the Code, but lacked their advantages of accurate, complete and timely compilation.

The method for determining maximum trade-in allowances provided for in the Code requires the submission of sworn reports of all used cars sold by Motor Vehicle Retail dealers. The sales so reported are of cars which ordinarily have been reconditioned by the dealer after he has acquired them as a trade-in. Such cars obviously have a much higher value when sold by the dealer than when originally received as a trade-in on the sale of a new car. Not all sales are included in the compilation but only those which represent used cars of the better grade. The formula stated in the Code calls for the elimination of sales not properly representative. The maximum trade-in allowance is thus substantially above the mere arithmetical average of all sales. Furthermore, used cars depreciate at the rate of 2% to 3½% a month. In spite of the fact that the sales reported occurred during the prior sixty-day period, no deduction for depreciation is provided by the formula. Thus the resulting figures represent an amount substantially in excess of the average values of used cars actually traded in, first, because the average is based upon sales prices received for used cars after they have been improved by reconditioning; second, because no deduction is made for depreciation; and, third, because a substantial portion of non-representative sales are eliminated. From this figure of the fair sales value of recon-

ditioned cars a deduction of a percentage of 5% to 15% is made representing the cost of selling and handling. The resulting figure is the maximum trade-in allowance.

The results determined by the application of the formula are subject to the approval of the National Recovery Administration. They are published and revised monthly in an Official Guide Book which is also subject to the approval of the National Recovery Administration. Thus it is evident that the method provides for the determination of a figure which will reasonably represent a fair maximum trade-in allowance for the particular type and model for the particular trade area in which a given dealer may be located.

The soundness of the trade-in allowance regulation of the Code is that neither the Government, the Code Authority nor any specific agency (with the possible exception of the consuming public itself) determines the value of the used cars. The basic law of supply and demand determines this value. Through the mechanism of Article IV of the Code, the free and unrestricted play of these forces are reflected in the sworn reports collected and compiled of the actual sales of used cars.

The argument advanced by the appellant (Brief, p. 125) that the "average maximum figure is arbitrary and capricious" is based on pure hypothesis that ignores the formula and safeguards employed by the Code to insure a high maximum figure based on better grade used cars and the result actually achieved in its operation. The appellant offered no proof that in any single instance the maximum Guide Book allowance was unfair or even that the owner of a used car would receive a sum in excess of the Guide Book allowance through the free and unrestricted market of the used car dealers. The appellant's entire argument on this point is in complete disregard of the record and depends entirely upon unsupported conclusions contained in its affidavits which are contrary to the findings of fact. There is simply no proof of the plight of the owner of a better grade

used car or of the difficulty of the Motor Vehicle dealers portrayed in the appellant's brief (pp. 125-127).

Nor are the statements made by the appellant of "oppression, hypocrisy and evasion" and "resort to the use of dictaphones" (Brief, p. 63) supported by the record or findings herein.

The lower Court's findings and conclusions.

Upon the evidence, the Statutory Court made findings of fact fully covering the method of determining and publishing the maximum trade-in allowances (R. (S) 22-26). Among other things, the Court found that the agency designated to compile the reports and determine, subject to the approval of the Administration, the maximum trade-in allowances, did not fix arbitrary prices without regard to reported sales and that it performed its duty conscientiously and complied both with the spirit and language of Article IV in arriving at the allowances published (R. (S) 24). The Court also found that the comprehensive reporting system provided in Article IV of the Code fixed a fair value in terms of money on used cars offered in trade as part consideration in the purchase of new automobiles (R. (S) 24). It also appears from the findings that the appellant has failed to support its charge that it lost sales by reason of any inadequacy or unfairness of the official guide book trade-in allowances (R. (S) 25).

In its opinion the Statutory Court said, 8 F. Supp. 437 at page 440, with respect to the reasonableness of the maximum trade-in allowances:

> "The code method of ascertaining the maximum used-car allowance is reasonable. To be sure, all practical price regulation may have as a consequence some individual inequalities. But a price based on an average of business or of trades in the past is harmonious and seems to be founded in fairness. An average arrived at from the amounts some of which are in

excess of and some below the mean does not work for invalidity as long as the basic principle or method is fair. The principle of regulation of price is fundamentally fair even though there is some reasonable disregard in individual cases. Such disregard is inherent in any broad social policy.

"There are no facts found in the complaint and moving papers supporting the plaintiff's claim of an unfair difference between the maximum used-car allowance permitted by the Code and the reasonable value of a car submitted for trade-in purposes. To support the plaintiff's case, it must be shown that the method of fixing the trade-in allowance is arbitrary or discriminatory, leading, by caprice or otherwise to unreasonable discrepancies. No more reasonable method of regulation for the correction of an evil of unfair trade is pointed out. Without a convincing showing by specific instances of unreasonable differences between the maximum permitted under the code and the real market values, no general charge of unconstitutionality can be sustained. *Jeffrey Mfg. Co.* v. *Blagg*, 225 U. S. 571; *Plymouth Coal Co.* v. *Pa.*, 232 U. S. 531."

The Court also found as a conclusion of law:

"The method provided in the Code of Fair Competition for the Motor Vehicle Retailing Trade of ascertaining the maximum used-car allowance is reasonable" (R. (S) 42).

The Code provisions are appropriate regulations under the rule of the decisions prior to the Nebbia case.

It has been demonstrated that the Motor Vehicle Code regulations are "appropriate measures" and that there is a "proper occasion" for their exercise. They thus meet the test laid down in *Nebbia* v. *New York*, 291 U. S. 502, and many other cases. They also equally satisfy the rule of the earlier cases such as *Tyson* v. *Banton*, 273 U. S. 418, 429, which denied the right of Governmental authority to fix prices. The regulations of this Code are not direct price fixing measures of the character declared void in those cases.

The establishment of a maximum allowance for used cars traded in upon the purchase of a new car, as prescribed by Article IV A of the Code, is in no sense the fixing of a price to be charged by the owner of the property sold. This Code provision does not apply directly to the owner (the seller) of the used car, who is also the prospective purchaser of a new car. The owner of the used car is free to sell his used car at any price he can get. Used car markets are open to him and there are many exclusive used car dealers through whom the car can be marketed (R. (S) 26).. The regulation applies only in the event the owner of the used car undertakes to trade it in upon the purchase of a new car and in such a transaction the regulation applies to the dealer (the purchaser) and not to the owner (the seller) of the used car. The object of the provision is to correct the serious competitive abuses, that were destroying the industry, namely, of secret rebates and exorbitant discounts allowed to purchasers under the guise of trade-in allowances on used cars received from the purchaser of a new car. The Code imposed no restriction upon the price at which the used car may be resold by the dealer after it has become his property.

Thus, it is evident that the trade-in allowance provision is not at all in conflict with the decisions prior to that in *Nebbia* v. *New York*, 291 U. S. 502. As was said in *Tyson* v. *Banton*, 273 U. S. 418, 429, one of the basic principles upon which the Court held that prices could not be regulated in a private business was "That the right of the owner to fix a price at which his property shall be sold or used, is an inherent attribute of the property itself, and, as such within the protection of due process of law clauses of the Fifth and Fourteenth Amendments." The trade-in allowance provision is not at all in conflict with this principle. It imposes no requirement that the owner of the old car must sell at any particular price; it imposes no requirement that the dealer, when he has become the owner of the old car, must sell it at any particular price. It prescribes only

a regulation of the transaction between a dealer and a prospective purchaser of a new car when that purchaser trades in an old car at the time of the purchase of a new one.

The restriction upon the retail price of a new motor vehicle, namely, that the dealer shall not sell at less than factory list price plus the additional items mentioned in Article IV B(1) (R. 26), does not place under governmental control fixation of the price of a new motor vehicle. The list price is fixed by the factory and no provision of the Code or any regulation thereunder imposes any restriction upon changes in the factory list price. The Court below has found (R. (S) 25) and it may be judicially noticed that there is intense competition between the factories in the value of new automobiles and the factory established prices are always subject to change. The only requirement of the Code is that once the factory list price has been established, it shall be adhered to by the dealers as the minimum price. This is in accordance with the long established practice of the trade under manufacturer-dealer contracts (R. (S) 25). This is quite different from having governmental authority prescribe the price at which a gallon of gasoline shall be sold as in *Williams* v. *Standard Oil Company*, 278 U. S. 235, or fixing the fee charged by an employment agency as in *Ribnik* v. *McBride*, 277 U. S. 350, or prescribing that a quart of milk shall be sold at a minimum price of 9 cents as in *Nebbia* v. *New York*, 291 U. S. 502. Were this Code a direct price fixing measure, governmental authority would direct that Model A cars shall be sold for $500.00, Model B cars for $600.00, Model X cars for $2,000.00.

In this case power to fix prices is retained by the manufacturers and is not exercised by the government. This provision of the Code insofar as it affects the price of new motor vehicles is equivalent to a regulation requiring the publication of prices and adherence to such published prices. Such a regulation is a regulation of trade practices to pre-

vent unfair competition, to prevent injury to competitors through secret rebates and to prevent unfair treatment of the consuming public through price discrimination.

Both the Federal and the State Governments, within and outside the field of interstate commerce, respectively, have from time to time enacted legislation designed to regulate methods of competition in trade and these statutes have uniformly been upheld as not in violation of the Fifth or Fourteenth Amendments to the Federal Constitution. Outstanding examples in Congressional Legislation are the anti-trust laws (Sherman Act, Title 15 U. S. C. 1-7 and Clayton Act, Title 15 U. S. C. 12-27, and the Federal Trade Commission Act, Title 15 U. S. C. 45). The anti-trust laws made illegal all contracts, combinations or conspiracies in restraint of interstate commerce and trade, and prohibited with certain exceptions, price discrimination between purchasers which tended to lessen competition or create monopolies. The Federal Trade Commission Act declared illegal all unfair methods of competition in commerce. All of this Federal Legislation is clearly a regulation of purely private business endeavor but has been upheld as valid and constitutional under the Fifth Amendment. *U. S.* v. *Joint Traffic Bureau,* 171 U. S. 505, 573.

Among the competitive practices regulated or prohibited under the above legislation are: Unduly extensive combinations in an industry, *Live Poultry Dealers Protective Association* v. *U. S.*, 4 Fed. (2d) 840; preferential price discriminations, *American Can Company* v. *Ladoga Canning Co.*, 44 Fed. (2d) 763, *Porto Rico American Tobacco Co.* v. *American Tobacco Company,* 30 Fed. (2d) 234; false and misleading labels in advertising, *Royal Baking Powder Co.* v. *Federal Trade Commission,* 281 Fed. 744; and sales below cost accompanied by representation tending to injure or discredit competitors and deceive purchasers, *Sears Roebuck & Co.* v. *Federal Trade Commission,* 258 Fed. 307.

Examples of state statutes of the type referred to are as follows: Statutes prohibiting the giving of premiums or

trading stamps in connection with retail sales except upon the payment of a high tax, *Rast* v. *Van Deman and Lewis*, 240 U. S. 342; *Tanner* v. *Little*, 240 U. S. 369; statutes prohibiting discrimination by a manufacturer between different localities in the matter of prices charged for his products for the purpose of destroying competition, *Central Lumber Company* v. *South Dakota*, 226 U. S. 157; a statute limiting insurance commissions, *O'Gorman & Young* v. *Hartford Fire Insurance Co.*, 282 U. S. 51; the so-called "blue sky laws," *Merrick* v. *Halsey Company*, 242 U. S. 568; and state statutes preventing combinations in restraint of trade, *Aikens* v. *Wisconsin*, 195 U. S. 194, *Grenada Lumber Company* v. *Mississippi*, 217 U. S. 433.

In a number of decisions, the Federal Trade Commission which is charged with the duty of preventing unfair methods of competition in commerce, has found price cutting an unfair method of competition. *Federal Trade Commission* v. *Noma Electric Corporation*, 15 F. T. C. 87; *Federal Trade Commission v. Oakes Company*, 3 F. T. C. 36; *Federal Trade Commission* v. *Fleischman Yeast Co.*, 1 F. T. C. 119; see also stipulation calling for abandonment of price cutting, 11 F. T. C. 524.

One of the primary purposes of the Clayton Act, c. 323, 38 Stat. 730, U. S. C. Title 15, Section 13, was to prohibit price discrimination when its effect was to substantially lessen competition or tend to create a monopoly.

The Courts have recognized that price cutting below a reasonable minimum may constitute an unfair method of competition. See for example *United States* v. *American Naval Stores*, 186 Fed. 592 (later reversed under the name of *Nash* v. *United States*, 229 U. S. 373, but on a different ground); *Story Parchment Company* v. *Patterson Company*, 282 U. S. 555, 561; *Standard Oil Company* v. *United States*, 221 U. S. 1.

The foregoing distinction between direct price fixing by governmental authority and the regulation of competitive practices was commented upon in *Ribnik* v. *McBride*, 277

U. S. 350, 355, where the Court recognized the rights of a State to license and regulate the business of an employment agent, but denied the power to fix the price which the employment agent should charge for his services.

A complete analogy to the provisions contained in Article IV of the Code is set forth in the opinion of this Court in *Tyson* v. *Banton* (*supra*, 443-444) where the Court denied the right of the State of New York to fix the maximum price at which theater tickets might be sold, but cited with approval an ordinance in Illinois "which required (1) that the price of every theater ticket shall be printed on its face and (2) that no proprietor, employee, etc., of a theater shall receive or enter into any arrangement or agreement to receive more." The distinction made by the Court in approving this regulation applies with equal force to the facts in the present case. The Court stated, "but the important distinction between that case (the Illinois ordinance) and this is that the ordinance did not forbid the resale of a ticket by a purchaser of it for any price he was able to secure, or forbid the fixing of any price by the proprietor which he thought fit, provided that price was printed on the face of the ticket." In the present case, the automobile manufacturer is not prevented from fixing any price he desires; the only requirement is that once the price is established, it shall be observed and all customers treated uniformly.

Conditions in the motor vehicle retailing trade have substantially improved.

In answer to the appellant's charge that the code regulations have hampered and hamstrung the Motor Vehicle Retailing Trade, we point to the fact that conditions in that trade have substantially improved.

At the time of the hearing in this case the Code had been in effect for less than a year. Statistics of motor vehicle sales and registrations were then available only for the first six months of 1934. But even for this short space of time,

a substantial improvement in both the business and employment within the Motor Vehicle Retailing Trade had been shown since the adoption of the Code (R. (S) 26). Total registrations for new car sales in the first six months of 1934 were 995,121 compared with 663,625 in the first six months of 1932, an increase of approximately 50 per cent (R. (S) 26). Monthly retail sales of all motor vehicles in the United States for the first six months of 1933 showed a total of 840,511 compared with a total of 1,272,443 for the corresponding months of 1934. This was an increase of more than 50 per cent (R. (S) 27). Employment in the manufacturing end of the automotive industry showed a total in May, 1934, for members of the National Automobile Chamber of Commerce of 206,965 compared with 99,343 in the month of May, 1933, an increase of over 100 per cent (R. (S) 26).

Recovery has been the outstanding feature of the entire automotive industry during the year 1934. Since the hearing in this case official reports confirm the improving trend in the Motor Vehicle Retailing Trade as recited in the Findings of Fact.

The preliminary report on the study of Regularization of Employment and Improvement of Labor Conditions in the Automobile Industry, recently submitted by the Research and Planning Division of the National Recovery Administration, makes the following statement (page 35):

> "This provision of stipulated top trade-in values for used cars has made possible a profitable operating record for thousands of dealers who before were forced to give away their entire margin in order to consummate a new car sale."

This report also indicated the marked improvement in the volume of sales in the trade, in the following statement (page 42):

> "The value of product of the automobile industry in 1929 was placed at $3,576,645,000. By 1932 the total

value of the product of the industry had declined to $793,000,000, increasing to $987,000,000 in 1933 and to $1,453,800,000 in 1934."

The annual report of the New York State Commissioner of Motor Vehicles published for the year 1934 reveals that the number of motor vehicles registered in New York State during the year 1934 increased by approximately 53,000 and the receipts from registrations and license fees by $2,000,000. 1,943,000 passenger cars were registered in the State of New York for the year 1934, the largest number of passenger vehicles in its history. These substantial increases in the registrations in the State of New York indicate equivalent increase in the volume of sales and furnish the best refutation of appellant's allegations (Brief, pp. 62, 127, 134-35) that the Code has hampered recovery in the Motor Vehicle Retailing Trade.

This improvement in the trade confirms the conclusion that the State and Federal Statutes and the Code are reasonable regulations of trade and have a real and substantial relation to the objects sought to be attained. It is submitted that there is nothing arbitrary or capricious in the regulations provided by the Motor Vehicle Code.

Procedural requirements of due process are satisfied.

The notice, hearing and other procedural steps in connection with the adoption of the Motor Vehicle Retailing Code fully meet the requirements of due process. The function exercised by the Recovery Administration in the adoption of the Code was the establishment of a rule of general application to be operative in the future. Such a function was legislative in character, but limited by the restrictions and standards specified in the Act. In proceedings of such character due process does not require that everyone who may conceivably be affected by such rule be actually heard in person. It is sufficient that reasonable notice be given of the hearing and that parties desiring to appear be

permitted to do so. *Assigned Car Cases*, 274 U. S. 564, 583. The nature and conduct of the hearing were in conformity with the functions being exercised. *Norwegian Nitrogen Company* v. *U. S.*, 288 U. S. 294, 317-19.

In the discussion under Point III the procedural steps in the adoption of this Code are examined in detail to show that all of the statutory requirements were met. (*Infra*, pp. 51-55.) That detail need not be repeated here. It will clearly appear from the examination of the procedural steps taken that all constitutional requirements with respect to procedure were fully satisfied.

Appellant has not shown damage.

The appellant's claim that it has been damaged by the Code provisions is highly speculative and not warranted by the record. Its claim is dependent first upon the unsupported premise that the appellant has lost sales by virtue of the Code regulation. The only proof offered in this respect was the unsupported conclusion of the appellant (R. 48) and the Court found that the appellant had lost no sales by reason of any alleged unfairness in the Official Guide Book trade-in allowances (R. (S) 25). Appellant's claim depends, secondly, upon the premise that such sales, had they been consummated, would have returned profits. It is reasonable to conclude in view of the court's findings as to the fairness of the maximum trade-in allowance figures that the appellant instead would have sustained losses. See *Hegeman Farms Corporation* v. *Baldwin*, 293 U. S. 163, 170-171.

The appellant's charges (Brief, p. 126) of damage to used car owners are inappropriate. It is obvious that used car owners are not compelled to accept any trade-in allowance but are free to dispose of their property either by direct sale to other members of the public or through the free channels of the used car dealer (R. (S) 26). In any event, this claim, if it possesses any merit, cannot be

advanced by the appellant but must be advanced by a member of the class adversely affected. *Jeffrey Manufacturing Company* v. *Blagg*, 235 U. S. 571, 576; *Plymouth Coal Company* v. *Pennsylvania*, 232 U. S. 531, 544-545.

Appellant also charges that the statutes and the code regulations denied it equal protection of the laws. There is no showing that the code regulations place the appellant at a disadvantage or in fact affects him adversely and this alone is fatal to the claim of denial of equal protection. *Nebbia* v. *New York*, 291 U. S. 502, 521.

The regulations of the Code are reasonable, founded on trade customs of long standing that have been developed both in design and application and carefully adapted to the end sought. It follows that the Statutes in question and the trade practice regulations of the Code fulfill all the requirements of the Fifth and Fourteenth Amendments of the Federal Constitution. *Nebbia* v. *New York*, 291 U. S. 502, 525; *Adams* v. *Tanner*, 244 U. S. 590; *Booth* v. *Illinois*, 184 U. S. 425; *McLean* v. *Arkansas*, 211 U. S. 539; *Wilson* v. *New*, 243 U. S. 332.

B. Congress May Regulate All Transactions in Or Affecting Interstate Commerce and the National Recovery Act Goes No Further.

The argument in appellant's point I A (Brief, pp. 6-35) is of doubtful relevancy to the issues here. There can be no constitutional objection to Congress directly or through administrative agencies, setting up standards or rules believed to be in the public interest and undertaking to secure their voluntary observance through educational or promotional activities. Only when Congress undertakes to compel obedience to a rule or standard does the question of Federal power over the subject matter arise. The compulsory features of the National Recovery Act are specifically limited to "transactions in or affecting interstate or foreign commerce."

The case of *Hammer v. Dagenhart*, 247 U. S. 251, is no insurmountable obstacle, as urged by appellant, (Brief, p. 16) to Federal regulation of transactions which in fact affect interstate commerce. *Brooks v. United States*, 267 U. S. 432, 438. The extent of Federal power depends upon the state of facts. *Stafford v. Wallace*, 258 U. S. 495; *Tagg Bros. v. U. S.*, 280 U. S. 420; *Chicago Board of Trade v. Olsen*, 262 U. S. 1; *Coronado Coal Co. v. United Mine Workers*, 268 U. S. 295; *U. S. v. Ferger*, 250 U. S. 199; *Dahnke Walker Milling Company v. Bondurant*, 257 U. S. 282.

Conditions may so change that an exercise of power held invalid upon one state of facts may be valid at another date upon a different state of facts. *Abie State Bank v. Bryan*, 282 U. S. 765; *Nashville, Chattanooga & St. Louis Railway v. Webster*, decided March 4, 1935, No. 183, October Term, 1934.

In answer to the appellant's charge that the National Recovery Act is an effort to override the field of State action, it is contended that the zone of State and Federal action depends upon the facts in each particular case. This is proven by the constant development in the application of the law by this court to the individual cases as they have been presented before it. It is not necessary here to draw the line of demarcation between State and Federal authority to regulate the retail sales of motor vehicles.

It is obvious that the breakdown in the retailing trade had a disastrous effect upon the motor vehicle manufacturing industry. The court below found that the Motor Vehicle Retailing Trade is an integral part of the manufacturing industry. The tremendous diminution in production of over 75 per cent that occurred in the automobile manufacturing industry can in a large measure be attributed to the destruction of the Motor Vehicle Retailing Trade (R. (S) 19). The exact extent of the reduction in interstate commerce between the factories and the motor vehicle dealers located throughout the country was 4,200,000 motor vehicles that had a dollar volume of $2,707,000,000. This does not take into consideration the

equally sharp reduction in interstate commerce in iron, steel, gasoline, rubber, plate-glass, nickel, lead, mohair and upholstery leather of which the automobile industry is the leading consumer or of lumber of which the automobile industry consumes approximately 14.5 per cent of all lumber used in the United States.

The cases cited by the appellant do not hold that the businesses involved could not be regulated in a proper case. They decided merely that under the facts of the particular case there was no evidence that the acts complained of burdened or affected interstate commerce. "Commerce among the States is not a technical, legal conception, but a practical one, drawn from the course of business." *Swift & Co.* v. *U. S.*, 196 U. S. 375, 398.

The appellant's argument (p. 26) that to sustain the validity of the Recovery Statute necessitates the overthrow of all of the doctrines with respect to interstate commerce is based on a failure to grasp the significance of the principles applied by the Court. All that is necessary is the normal, and natural development of the law to a statement of facts that have been revised by the tremendous technological advance of industry and its method of production.

C. The Delegation of Power Made by the National Recovery Act Is Consistent with Constitutional Requirements.

Section 3 (a) of the National Recovery Act, pursuant to which the Code of Fair Competition for the Motor Vehicle Retailing Trade was adopted and approved, is assailed on the ground that it is an unconstitutional delegation of legislative power by Congress to the President.

The authorities and precedents relating to the delegation of legislative power have been so fully reviewed in the two learned opinions of this Court in the recent case of *Panama Refining Company* v. *Ryan*, decided January 7, 1935, that any detailed discussion here of the principles involved would appear superfluous. The majority opinion said:

"Accordingly, we look to the statute to see whether the Congress has declared the powers with respect to that subject; whether the Congress has set up a standard for the President's action; whether the Congress has required any finding by the President in the exercise of the authority to enact the prohibition * * * undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the National Legislature could not deal directly. The constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicability which will enable it to perform its functions in laying down policies and establishing standards while leaving to selected instrumentalities the making of subordinate levies within prescribed limits and the determination of facts to which the power, as declared by the legislature is to apply."

As our first point we have sought to establish the facts of acute emergency and the radical alteration the entire economic system has experienced. The presence of these two outstanding factors pervades every legal problem raised by the Recovery Legislation, and consideration of them is essential to a sound approach and judgment of its validity. In the light of these facts the policies established in the Recovery Act are definite, "intelligible principles"; clear, "ascertainable standards" and the delegation of power is reasonable.

The declaration of policy is contained in Section 1 of the Act wherein after declaring the existence of an emergency, it is declared to be the policy of Congress, among other things,

"(a) To remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof.

"(b) To provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups.

"(c) To induce and maintain united action of labor and management under adequate governmental sanctions and supervision.

"(d) To eliminate unfair competitive practices.

"(e) To promote the fullest possible utilization of the present productive capacity of industry.

"(f) To avoid undue restriction of production (except as may be temporarily required).

"(g) To increase the consumption of industrial and agricultural products by increasing purchasing power.

"(h) To reduce and relieve unemployment.

"(i) To improve standards of labor.

"(j) Otherwise to rehabilitate industry.

"(k) To conserve natural resources."

A definite standard for the President's action is set forth in Section 3(a) which provides "The President may approve a code or codes of fair competition for the trade or industry." This approval and the exercise of this power, however, is made subject to the following conditions that must be fulfilled. The President must find that—

(1) Such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivision thereof, and

(2) That such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and

(3) That they will tend to effectuate the policy of this title.

The provisions of the code of fair competition to be approved by the President must relate to and carry out the policies of Section 1 of the Act in order to satisfy the provision that the code must tend to effectuate the policy of this title.

The administrative details of the formulation of Codes of Fair Competition for the many diverse industrial and trade groups of this entire country were a task that could not possibly have been handled by legislative bodies. The Congress obviously could not hold hearings, receive evidence, and hear proof for the purpose

of determining the competitive evils of each industry; evaluate those of a major degree of seriousness, the design of proper regulation for their correction and finally submit the result to the test of the conflicting points of view of labor, the producer and consumer before their approval. That this procedure was necessary, due to the varying nature of unfair competition in the diverse industries of the nation is clearly indicated by the different forms of regulations of fair practice contained in the 500 or more codes that were adopted.

Appellant charges the provisions of the statute are vague in the extreme (Brief, p. 26). There is a sharp distinction between vagueness and elasticity. There is a complete difference between general impressions, no matter how vivid their character, and proof developed by evidence and investigation. The Congress could not in advance specify the precise competitive practices it desired to curb. As a matter of fact if it had done so it would have defeated the very purpose of the legislation.

The remaining question is whether Congress has established a policy or standard to guide the President in approving codes. There are at least two indications in the Act of what the codes were to contain. They were to be codes of *fair competition*. This expression is then given substance and meaning by the requirement that such codes "must tend to effectuate the policy of this title," which policy is set forth in Section 1 of the Act.

The phrases "codes of fair competition" and "unfair competitive practices" in conjunction with the declaration of policy contained in the Act and its express purposes, establish definite and certain standards fully equal to those established by such phrases as the following:

"Unfair methods of competition" as used in the Federal Trade Commission Act. *Federal Trade Commission* v. *Gratz*, 253 U. S. 421; *Federal Trade Commission* v. *Keppel & Bro.*, 291 U. S. 304. It will be noted that the Federal Trade Commission Act contained no indication at all as to

the meaning of "unfair methods of competition." In the Recovery Act Congress sets forth in Section 1 the criteria by which the contents of the "codes of fair competition" were to be determined and required the President to find that the codes conformed to the standards thus established. Congress in the Recovery Act was more definite and specific in setting up a guide post for administrative action than in the Federal Trade Commission Act.

"Just and reasonable rates" as used in the Interstate Commerce Act.

"In the public interest" as used in the Interstate Commerce Act (Section 5, paragraph 2). *New York Central Securities Corporation* v. *United States*, 287 U. S. 12, 24.

"In the interest of the public and the commerce of the people" as used in the Interstate Commerce Act (Section 1, paragraph 15 as amended by Section 402 of the Transportation Act). *Avent* v. *United States*, 266 U. S. 127, 130.

"In the public interest" as used in the Trading with the Enemy Act relating to sales of alien property. *United States* v. *Chemical Foundation*, 272 U. S. 1, 12.

"Public convenience, interest or necessity requires" as used in the Radio Act of 1927 (44 Stat. 1166) as amended by Section 5 of the Act of March 28, 1928 (45 Stat. 373). *Radio Commission* v. *Nelson Brothers Company*, 289 U. S. 266, 285.

Appellant urges that there has been an unconstitutional delegation of power for the reason that trades or industries are said to be empowered to adopt their own codes, a delegation of authority which Congress cannot make. Such an argument does violence to the language of Section 3 of the Act. By Section 3(a) trade or industrial associations or groups may apply to the President to obtain approval of codes of fair competition which he may approve only if he finds the facts showing that they conform to the statutory requirements.

Congress wisely sought to enlist the cooperation of trades and industrial groups and invited them to present to the

President and his advisers their own peculiar problems and pressing needs. In this way much valuable time was saved. But the right of approval, without which the codes could not come into being, was expressly reserved to the President and, as this record shows, he alone exercised it. Industry was constituted a voluntary petitioning group, but the President, subject to the statutory restrictions, was the final arbiter.

Nor is there any delegation of power to non-governmental agencies in the administration of the Code. The determination of the maximum trade-in allowance is subject to the approval of the Administrator (Article IV A(1) of the Code, R. 24). While the National Automobile Dealers Association is designated as the agency to assemble and compile used car sales reports and while various committees or so-called code authorities participate in the administrative detail, no power of decision or compulsion is delegated to these agencies under the Motor Vehicle Retailing Code. Their function is but to suggest or propose, to execute orders of the Administration and to attempt to secure, by persuasion, compliance with code regulations. All powers of decision and compulsion are reserved to the Administration designated by the President as the governmental agency to which he has delegated the administrative powers conferred upon him.

It must be concluded that the standards prescribed by the National Recovery Act are sufficiently definite and certain to meet the test for valid delegation of power as laid down by the decisions of this Court.

D. The Definiteness and Certainty Required in the Definition of Crimes Are Fully Satisfied.

While the National Recovery Act provides for penalties, the sections of the Act delegating to the President the authority to approve codes, need not be stated with the same degree of definiteness and certainty as is required

in a criminal statute. Penalties provided by the Recovery Act do not relate to the provisions delegating authority to the President. The penalties provided in the Act are for a violation of provisions of a Code or regulations issued pursuant to the authority delegated to the President. The requirement for definiteness and certainty in a criminal statute is with respect to the definition of the nature and quality of the crime. Therefore, such requirements of definiteness and certainty relate to the provisions of the Code or the regulations themselves rather than to the provisions of the statute delegating authority to the President to approve codes or prescribe regulations.

In *Champlin Refining Company* v. *Commission*, 286 U. S. 210, it was held that the section of an Oklahoma statute establishing a legislative standard for guidance of the Commission in prorating oil production was valid; although a subsequent section of the act phrased in similar language which sought to define a punishable offense was held to be too vague and indefinite. Here the National Recovery Act prescribes a legislative standard in delegating authority to the President to approve codes of fair competition and for such purposes the standard is sufficiently definite and certain even though similar language might be held too vague and indefinite if the statute were a penal one making it a crime and imposing a penalty upon any one who violated the general rule stated. Under the Recovery Act the Code of Fair Competition approved by the President describes with definiteness and certainty the specific rules of conduct which must be observed by the members of any industry or trade subject to the code of fair competition, the violation of which subjects the violator to penalties. There is no difficulty in determining, upon an examination of the provisions of the Code, whether or not an act constitutes a violation thereof.

Congress may make violations of rules prescribed by administrative officers or commissions a crime. Thus a statute (Transportation Act of 1920, 41 Stat. 456, 474, 476) author-

izing the Interstate Commerce Commission to establish rules in emergencies with regard to car service and making violations of such rules a crime was upheld in *Avent* v. *United States*, 266 U. S. 127. In *United States* v. *Grimaud*, 220 U. S. 506, 522-23, a statute making the violation of rules and regulations prescribed by the Secretary of Agriculture a crime was held valid. The violation of such rule is made a crime not by the administrative officer but by Congress. The statute and not the administrative officer fixes the penalty.

POINT III.

THE MOTOR VEHICLE RETAILING CODE MEETS ALL THE REQUIREMENTS OF THE STATUTES.

There remains for consideration the question whether the Motor Vehicle Retailing Code complies with the requirements of the statutes. Any code adopted must comply with certain procedural requirements, the regulations contained in the Code must be within the meaning of the terms used by the Act, and the Code must not permit monopolies or monopolistic practices. The requirements applicable to the Motor Vehicle Retailing Code are contained in Section 3(a), which reads as follows:

> "Sec. 3. (a) Upon the application to the President by one or more trade or industrial associations or groups, the President may approve a code or codes of fair competition for the trade or industry or subdivision thereof, represented by the applicant or applicants, if the President finds (1) that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof, and (2) that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of this title; Provided, That such code or codes shall not permit monopolies or monopolistic practices; Provided, that where

such code or codes affect the services and welfare of persons engaged in other steps of the economic process, nothing in this section shall deprive such persons of the right to be heard prior to approval by the President of such code or codes. The President may, as a condition of his approval of any such code, impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code, as the President in his discretion deems necessary to effectuate the policy herein declared."

Section 3(b) makes the provisions of such code, when approved, the standards of fair competition for that trade and any violation thereof is declared to be an unfair method of competition within the meaning of the Federal Trade Commission Act (38 Stat. 719, 15 U. S. C. 45). Provision for the enforcement of codes is made by authorizing injunction suits at the instance of the United States Attorney under the direction of the Attorney General in the several district courts of the United States to enjoin violations of the Code, and by imposing a penalty of $500.00 for each offense in violating a code or a regulation, recoverable upon prosecution and conviction for a misdemeanor (Sections 3 (f) and 10 (a)).

Other provisions of the Act authorize the establishment of such agencies and the utilization of such Federal officers and employees and, with the consent of the State, such State and local officers and employees as may be necessary (Section 2 (a)) and the delegation by the President of his functions and powers under the Act to such officers, agents and employees as he may designate or appoint (Section 2 (b)). The President is also authorized to prescribe rules and regulations necessary to carry out the purposes of the Act (Section 6 (b) and Section 10 (a)).

A. Procedure in Adoption and Approval of the Code Was in Accordance with the Statute.

Section 3(a) authorized the President to approve a Code of Fair Competition for a trade presented by an applicant trade association, upon the following findings:

(a) That the applicant association imposes no inequitable restrictions on admission to membership therein and is truly representative of the trade.

(b) That the Code is not designed to promote monopolies.

(c) That the Code is not designed to eliminate or oppress small enterprises and will not operate to discriminate against them.

(d) That the Code will tend to effectuate the policy of Title I of the Act (the declaration of policy being contained in Section 1).

The section contains two additional provisos which impose conditions upon the approval of codes, namely:

1. That the Code shall not permit monopolies or monopolistic practices.

2. That when such Code affects the services and welfare of persons engaged in other steps of the economic process, nothing in Section 3 (a) shall deprive such person of the right to be heard prior to the approval by the President of such Code. Fulfillment of this proviso manifestly required a public hearing with reasonable notice to permit any interested person an opportunity to be heard. The provisions of Section 6 (b) and Section 10 (a) authorized issuance of regulations which embraced the holding of hearings and the formulation of procedure to be followed in the presentation of Codes and their consideration prior to approval by the President.

Contemporaneously with the signing of the National Recovery Act on June 16, 1933, there was issued Executive Order No. 6173 which is set forth in Appendix C (Vol. 2 p. 15). At the same time the National Recovery Administration published in its Bulletin No. 1 a statement by the

President outlining procedural policy (see Appendix C, Vol. 2, p. 17). On June 19, N.R.A. Bulletin No. 2 was issued for the purposes of disseminating the basic procedure and principles underlying Code making and in that bulletin specific requirements regarding notice, hearings and other procedural matters were stated. (See Appendix C, Vol. 2, p. 22.)

By Executive Order No. 6205-B issued July 15, 1933 (See Appendix C, Vol. 2, p. 16) the rights of persons who had not participated in the hearings establishing a Code, but who were directly affected thereby, were safeguarded by providing for hearings after the approval of the Code. Thus, from the date of the enactment of the National Recovery Act, definite procedural requirements were established and had to be fully complied with in the adoption of Codes of Fair Competition.

The Motor Vehicle Code was submitted, considered and approved in accordance with the procedure outlined above. An application for a Code was submitted August 30, 1933, by the National Automobile Dealers Association which was shown to be representative of the Motor Vehicle Retailing Trade (R. (S) 27-28). Wide publicity was given to the application and the various drafts of the Code. After informal discussions and revisions, a proposed Code was submitted by the Association on September 7, 1933. A public hearing was set for September 18, 1933. This hearing was announced by press release of September 8, 1933, which was given wide publicity (R. (S) 28). A formal notice of hearing was issued (Notice of Hearing No. 99) which was mailed to all persons, firms and organizations known to be interested (R. (S) 29). Such direct notice was given to practically every automobile dealer in the country of whom there were approximately 32,000. This notice was also posted on the official bulletin board of the National Recovery Administration and placed in all United States Post Offices above third class (R. (S) 29). It was also given wide publicity through insertion in Trade Journals (R. (S) 29). A copy of the notice of hearing is set forth in the Find-

ings of Fact (R. (S) 29) and also appears in the affidavits (R. 121). Public hearing was duly held at the time and place specified in the notice and numerous witnesses were heard and evidence and proof was furnished that destructive price cutting in the form of over-allowances granted on trade-ins had caused the breakdown of the economic functions of the industry (R. (S) 31). The evidence submitted and briefs and written statements filed, constituting the record of the hearing, were the basis of a report by the Deputy Administrator who transmitted the final draft of the Code to the Administrator, with the recommendation that the same be approved.

The record as above described contained detailed evidence regarding the competitive abuses in the Motor Vehicle Retailing Trade and particularly the excessive trade-in allowances which had brought about the economic breakdown of the trade. On this subject the report of the Deputy Administrator stated:

> "Unsound trade practices have resulted from the dealers efforts to maintain a satisfactory volume of sales. As the result of these practices, it is claimed that approximately 90 per cent of motor vehicle dealers, employing more than 250,000 workers, are insolvent.
>
> "It may safely be said that practically every motor vehicle dealer has developed, as the result of the highly competitive nature of this business, an increasing tendancy toward an allowance for a prospective customer's old car greater than it can be sold for. This condition has become increasingly serious, and is a ruinous form of price cutting" (R. (S) 33).

The report of the Deputy Administrator contains all of the other required findings. The Deputy Administrator's report was approved by the Administrator who transmitted it, together with the final draft of the Code, to the President with the recommendation that it be approved. The President adopted and approved the report, recommendations

and findings of the Administrator and approved the Code by Executive Order dated October 3, 1933 (R. (S) 36).

The Deputy Administrator's report specifically found that all statutory requirements were complied with in the procedure leading up to the submission of the Code for the President's approval. It also specifically found that the National Automobile Dealers Association was representative of the Trade and required no inequitable restrictions on admission to membership (R. (S) 33, 35).

After discussion of the unsound trade practices prevalent in the industry and the provisions of the Code designed to correct these abuses, the report contained the finding that the Code is not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them and will tend to effectuate the policy of Title I of the National Industrial Recovery Act (R. (S) 35).

The Deputy Administrator's report also contains the finding that the Trade was made up of dealers of two classes, namely, the new car dealers and independent used car dealers and that proper representation from both classes of dealers had been provided on all administrative committees.

All of these findings were approved and transmitted by the Administrator to the President, who adopted and approved such report and findings and approved the Code. All requirements of the statute as to findings were thus complied with and the order of approval clearly rested upon the findings so made.

No complaint was made by the plaintiff below that these findings were not supported by the evidence adduced at the public hearings.

The Court below found that the appellant was a member of two trade associations, local and state, both of which were members of the National Association. These local trade associations had participated, with the National As-

sociation, in the submission and sponsorship of the Code of Fair Competition for the Motor Vehicle Retailing Trade.

The Court below also found that the plaintiff has not sought, through any of the agencies established for that purpose, any exemption, modification or stay of the Code. Despite Executive Order No. 6205-B, already referred to (Appendix C, Vol. 2, p. 16), the appellant failed to apply for exemption from, or modification of the Code. Section 3(a) of the National Recovery Act specifically authorizes the President to grant exceptions to and exemptions from the provisions of any code. This administrative remedy should have been utilized by the plaintiff below before it resorted to a suit to enjoin the enforcement of the Code. *Hegeman Farms Corporation* v. *Baldwin*, 293 U. S. 163, 172; *Petersen Baking Company* v. *Bryan*, 290 U. S. 570, 575-76; *United States* v. *Illinois Central R. Co.*, 291 U. S. 457, 463, 465; *Porter* v. *Investors Syndicate*, 286 U. S. 461, 470, 471.

After approval by the President, the Code was given immediate and wide publicity. Printed copies were obtainable from the Office of the National Recovery Administration or from the Superintendent of Public Documents. This Code was No. 46 of the Codes approved pursuant to Section 3(a) of the National Recovery Act. It is published at pages 563-74 of Volume 1 of the National Recovery Administration's publication entitled "Codes of Fair Competition."

B. Trade Practice Provisions of the Motor Vehicle Code Comply with the Terms of the Statute.

The history of the legislation enacted for the purpose of regulating competition clearly indicates that the National Recovery Act is a part of the development of regulatory law required by the increasing complexity of trade and commerce. As has already been pointed out, the Sherman Act, Clayton Act, and Federal Trade Commission Act represent in their respective fields, the exercise of the same power

employed by Congress in the enactment of the Recovery Statute. The earlier statutes are landmarks of the economic conditions that prevailed and that in turn called forth their enactment. The Recovery Statute equally symbolizes the present economic background and necessities that gave it birth. The scope of all this legislation is the field of competitive practices. The radically altered economic system dominated by the acute national emergency, has created competitive evils of different nature and new trends in accordance with its character.

Unfair competitive practices.

This concept of "Unfair Competitive Practices" must be examined therefore in the light of the destructive competitive forces the legislation was intended to curb. It was patently impossible for the Congress, confronted suddenly by new economic conditions, to specifically designate by name or precise description, the destructive competitive practices whose ravages it desired to limit. In the rapidly shifting economic scene, unfair competitive practices of infinite variety waned and developed. The legislative branch of the government could in no sense deal in detail with a situation that required swift action and evaluations. It could, however, and did pursue the procedure it had previously followed in the enactment of the Federal Trade Commission Act. It employed a term which it deemed sufficiently broad and elastic to encompass every serious form of unfair practice.

This Court, in commenting in *Federal Trade Commission v. R. F. Keppel & Bro.*, 291 U. S. 304, 310-312, on the procedure followed in the enactment of the Federal Trade Commission Act, said:

> "As proposed by the Senate Committee on Interstate Commerce and as introduced in the Senate, the bill which ultimately became the Federal Trade Commission Act declared 'unfair competition' to be unlawful.

> But it was because the meaning which the common law had given to those words was deemed too narrow, that the broader and more flexible phrase 'unfair methods of competition' was substituted. Congress, in defining the powers of the Commission, thus advisedly adopted a phrase which, as this Court has said, does not 'admit of precise definition' but the meaning and application of which must be arrived at by what this Court elsewhere has called 'the gradual process of judicial inclusion and exclusion.' "

In like manner, the term "Unfair Competitive Practices," was for the same reason incorporated in the National Recovery Act. It must be presumed that Congress was not simply repeating the prohibition contained in the existing law, but was extending the existing law to meet the conditions that required its enactment.

Indeed, during the Congressional debates on the bill, Congressman Kelly of Pennsylvania, voiced this necessity, saying (Congressional Record, Vol. 77, pp. 4218-19):

> "This industrial recovery act sets up a new meaning for the term 'Fair Competition.' These codes must deal with the fundamental elements of competition under the modern industrial system if they are to carry out the purpose of this Act. The four essentials in any code of fair competition are price, production, wages, and hours.
>
> "There must be agreements as to minimum price. Omit that and the door is open to all the cut-throat competition which has almost destroyed industry. The price must be fair in that it includes a just return to the producer. Establishment of a maximum price will not serve since it would permit destructive competition from that level down to zero. Under it practically all today's evils would flourish.
>
> "The code must contain agreement as to production. We are undertaking to establish a balance between production and consumption. If there is unrestrained production of goods without regard to their consumption, surplus supplies will pile up, with re-

sultant unemployment and chaos. Each industry can work out its apportionment of production to the various units. Without doubt the past performance of each unit will be the yardstick for determining its quota of the production needed to meet the demand. As consumption increases, the production will rise in proportion.

"The code must contain agreements as to wages and hours. These are mandatory under the law and will be vital to the maintenance of fair competition.

"If this measure is enacted, there will be established a new and better definition of fair competition. It will include all the trade practices which have worked out in the past. It will also include within its scope fair prices, fair production, fair wages and fair hours. If that kind of competition can be secured and safeguarded, the economic problem is solved."

See also Appendices D and E (Vol. 2, pp. 28, 50).

The term "unfair competitive practices" as used in the National Recovery Act must therefore be construed as embracing a much broader field than that within the term "unfair methods of competition" as used in the Federal Trade Commission Act.

Codes of fair competition.

In construing the term "Codes of Fair Competition" as used in Section 3 (a), reference should also be had to the competitive conditions existing at the time the statute was enacted and the abuses it was designed to remedy, as briefly recited above. For the reasons there stated the term "Codes of Fair Competition" must be given a broad significance.

Reference should also be had to the trade practice conferences held under the auspices of the Federal Trade Commission and the codes of fair competition approved by the Commission during a long period of years prior to the enactment of the National Recovery Act. The trade practice rules contained in these Commission-approved codes, when

considered in the light of new competitive abuses and the suspension of the anti-trust laws accompanied by the Recovery Act, indicate the nature of the trade practice regulations contemplated by the terms used in the Recovery Act.

Federal Trade Commission Codes Prior to Recovery Act.

The first trade practice conference was held in 1919. By July 1, 1925, there had been some twenty conferences held (Federal Trade Commission Annual Report Year ending June 30, 1926, page 49). In 1926 the Commission established a trade practice conference division (Federal Trade Commission Annual Report Fiscal Year ending June 30, 1926, pages 48-49) and in succeeding years the trade practice conferences were a substantial and important part of the work of the Commission. In its publication entitled "Trade Practice Conferences" under date of June 30, 1933, the Commission states at the opening of the foreword (page vii):

> "Approximately 150 industries have adopted codes of fair competition at trade practice conferences held under the auspices of the Federal Trade Commission acting in the public interest."

The object of these trade practice conferences was to formulate rules governing competitive practices. Such rules after being adopted by representatives of the industry or trade groups were submitted to the Commission for its examination and review following which the Commission would issue such rules as it approved. The rules were divided into two groups, first, those the Commission accepted as rules that could be enforced by the Commission under its existing powers over unfair methods of competition; and, second, those rules accepted as representing the views of the industry to which the Commission had no objection, but which it would not undertake to enforce (Fed-

eral Trade Commission—Trade Practice Conferences, July 1, 1929, pp. 60-61).

There was no specific legislative authority for the formulation and approval of these Codes of Fair Competition (other than the mandate in Section 5 of the Federal Trade Commission Act—to *prevent* unfair methods of competition in commerce).

These Codes were, of course, subject to the limitations and restrictions of the Anti-Trust Acts.

The practice of the Commission in respect to the Trade Practice Conferences and the issuance and approval of Codes of Fair Competition was well known to all important industrial and trade groups in the nation at the time of the enactment of the National Recovery Act. It was equally well known that the efficacy of such proceedings in dealing with abuses arising out of cut-throat competition was considerably restricted by the prohibitions of the Anti-Trust Acts and the lack of concrete affirmative authority in the Federal Trade Commission Act. Therefore, when Congress provided a National Recovery Act for the regulation of business through Codes of Fair Competition and removed the restrictions of the Anti-Trust Acts on regulations contained in and actions pursuant to such codes, it must be concluded that Congress intended to permit not only all rules of the character which had been approved by the Commission, but also additional rules of like character which the Commission had been unable to approve by reason of the restrictions of the Anti-Trust Laws.

This conclusion, likewise, is clearly supported by the Congressional debates. Congressman Kelly, of Pennsylvania, in supporting the proposed Bill on the floor of the House, said (77 Congressional Record, p. 4218):

> "Mr. Chairman, for ten years or more almost every trade and industry has been trying to establish codes of ethics and fair practices which help build business on a better basis. They have met in convention and have earnestly sought to meet the problem of destructive competition in a fair and lawful manner.

"I have been present when some were adopted. I have read more than fifty codes adopted by various trade associations. They are all practically the same and they are all equally impotent. They do not have and they cannot be given, without proper supervision, a weapon powerful enough to do the work required.

"I hold in my hand the code adopted by the fabricators of Ornamental Iron, Bronze, and Wire, approved by the Federal Trade Commission. It provides against the substitution of inferior materials, selling goods below cost with the intent of injuring a competitor, secret rebates, breach of contract with competitors, shipping goods which do not conform to samples, bribing shippers or employees of competitors, discrimination in price between purchasers to create monopoly, obtaining information surreptitiously as to competitors' bids, and so forth.

"All these declarations against unfair practices are but a pious waste as far as results are concerned. Cutthroat competition rages through trades and industries which have adopted these rules.

"What we must have is a real definition of fair competition and an effective plan for securing it in trade and industry."

An examination of the nature of the rules of fair competition approved by the Commission in these earlier codes may, therefore, be of assistance in ascertaining the meaning of the terms used in the Recovery Act and in determining the character and degree of competitive practice regulations permitted by the present Act.

Prior Regulations of trade-in allowances.

While the practice of accepting used articles as a trade-in upon the purchase of new, is not prevalent in many industries or trades, and the occasion therefore for regulation of trade-in allowances would not often arise, a number of rules approved by the Commission related to this subject. Such a rule appears in one of the early trade practice conference rules, namely, that for Band Instrument Manufacturers

adopted under date of September 15, 1924. The preamble* to that Code condemns in vigorous language excessive allowances on used instruments and by Rule 5 of the Code forbids granting allowances in excess of the actual value of the second-hand instruments taken in exchange for the new (Federal Trade Commission—Trade Practice Conferences, July 1, 1929, pp. 44-45).

In the rules adopted by the Steel Office Furniture manufacturing industry, under date of July 25, 1929, Rule 1 (b) requires the publication of allowances made for used office furniture of various makes and models and prohibits the publishing of any false or fictitious allowance for any make or model of used equipment (Ibid, pp. 209-210). References are also made to old machines traded in on new in Rule 11 of the Woodworking Machinery Industry adopted under date of February 11, 1929, and in Rule 10 of the Concrete Mixer and Paving Industry adopted under date of November 21, 1929.

Rules against price discrimination and secret rebates.

Rules against price discrimination and secret rebates had been adopted by many of the trade practice conferences. These rules were, of course, limited by the restrictions of the Anti-Trust laws. The price discrimination rule was limited to such discrimination as would substantially lessen competition or tend to create monopoly. A rule of this character was in force in 25 industries and somewhat simi-

*"Even when no subsidy is involved, the granting of excessive allowances for used instruments taken in exchange is against public interest. It constitutes price discrimination, and is unfair to customers who have no instruments to exchange or who trade in their instruments at a fair valuation. Overallowances are conducive to the development of misleading and improper trade practices, such as quoting fictitiously high prices and making false reductions on new instruments when no used instrument is taken in exchange. Furthermore, a consistent policy of granting overallowances on used instruments leads inevitably to either business failure or to a regular policy of overpricing new instruments to the consequent detriment of the buying public. The evil of granting overallowances is frequently promoted by ignorance of the real value of the instrument taken in exchange and the difficulty of obtaining accurate information on that subject."

lar rules in a number of additional industries. A rule in substantially the following form:

> "The payment or allowance of secret rebates, refunds, credits or unearned discounts whether in the form of money or otherwise, or extending to certain purchasers special services or privileges not extended to all purchasers under like terms and conditions is an unfair trade practice."

was in force in at least 20 industries and variations of the rule were in force in at least 10 others.

A rule against selling goods below cost for the purpose of injuring a competitor or lessening competition was also adopted by 25 industries in substantially a standard form, and additional industries had adopted variations of this rule. There were also a number of rules relating to price publication and maintenance of published prices.

During the fiscal year ending June 30, 1931, by reason of objections having been made that the trade practice conference rules either singly or in combination were countenancing activities contrary to the Anti-Trust Laws, substantially all of the outstanding rules were revised by the Commission and standarized. This general revision materially limited the scope of the rules in order to prevent possible conflict with the Anti-Trust Laws. Their very limitation defines the general outlines of the field covered by the succeeding and present legislation. However, the nature of these rules is significant as indicating the character of trade regulation that might be undertaken with the restrictions of the Anti-Trust Laws removed as has been done by the Recovery Act. In Federal Trade Commission—Trade Practice Conferences—June 30, 1933, are published the revised rules then in effect for some 96 industries. 61 of those industries had a price discrimination rule in a standard form and 7 others had a variation of the rule, 68 of the 96 industries had a rule prohibiting the secret payment or allowance of rebates, refunds, credits or unearned

discounts in a standard form and 5 others had variations of the rule. 64 of the industries had a rule prohibiting selling below cost.

From the foregoing, it is evident that trade regulations substantially identical to those contained in the present Code of Fair Competition for the Motor Vehicle Retailing Trade were adopted in the rules approved by the Federal Trade Commission in connection with their Federal Trade Practice Conferences during a period of many years preceding the enactment of the National Recovery Act. But for the restrictions of the Anti-Trust Laws, the present rules of the Motor Vehicle Code, doubtless could have been approved by the Commission and they are now clearly permissible in view of the exemption from the provisions of the Anti-Trust Acts granted by Section 5 of the National Recovery Act.

Terms of the Recovery Act Have a Broader Meaning Than Those of Federal Trade Commission Act.

It is to be noted that Section 3 (a) of the National Recovery Act provides an affirmative approach to the problem of dealing with competitive practices by establishing rules of *fair* competition, rather than the negative approach followed by the Federal Trade Commission Act and other previous laws in prohibiting *unfair* methods of competition. The prohibitions of the Federal Trade Commission Act, restricted as they were by the anti-trust laws, had failed to prevent the cutthroat competition and other abuses which developed in such serious proportions during the depression. The Recovery Act was enacted to overcome the defects in existing legislation and clearly contemplated the determination according to the peculiar conditions of each industry or trade of what rules were necessary to accomplish fair competition.

In using the term "fair competition" Congress clearly did not intend merely the converse of "unfair methods of competition". Had it so intended it would undoubtedly

have used the phrase already judicially construed. But such a prohibition would merely duplicate an existing statute. It would have made wholly meaningless and unnecessary the exemptions from the anti-trust laws contained in Section 5. The legislative history and the hearings as already indicated show that Congress intended to reach competitive abuses which existing statutes had failed to prevent or correct.

Under the judicial construction of the Federal Trade Commission Act price cutting and selling below cost of production was permissible unless it took the form of price discrimination or was utilized as part of a system to restrain trade or monopolize. Yet "cutthroat" competition was one of the chief abuses developed in the depression and the principal competitive abuse Congress sought to prevent. (See Appendices D and E, Vol. 2, pp. 28, 50.) Thus Congress intended to do more than merely re-enact the Federal Trade Commission Act. It did not intend merely to set up a new machinery to deal with practices already amply provided for. The Act as a whole and its legislative history demonstrate a clear intention to put into operation machinery for prohibiting the practices which had brought about the economic crisis and adequate to deal with them. The Act embodies a new and advanced concept of fair competition.

Therefore, in enacting Section 3 (b) of the National Recovery Act which reads as follows:

> "Sec. 3(b). After the President shall have approved any such code, the provisions of such code shall be the standards of fair competition for such trade or industry or subdivision thereof. Any violation of such standards in any transaction in or affecting interstate or foreign commerce shall be deemed an unfair method of competition in commerce within the meaning of the Federal Trade Commission Act, as amended; but nothing in this title shall be construed to impair the powers of the Federal Trade Commission under such Act, as amended."

Congress clearly expressed the intention to extend the term "unfair methods of competition" as used in the Federal Trade Commission Act, to include the competitive abuses which the Recovery Act was designed to correct and prevent.

Code Provisions are Permitted by the Recovery Act Even Though Considered Price Regulations.

We definitely contend that the regulations provided in the Motor Vehicle Code are not price fixing measures. However, even if it be assumed for the purposes of argument that they are price fixing, they are warranted by economic conditions and are authorized by the terms of the Recovery Act. Price cutting as a principal factor in the general collapse and breakdown of industry has already been described. The practical impossibility of securing the assumption by trades and industries that were on the verge of bankruptcy of increased costs in the form of higher compensation and shorter working hours for labor (one of the declared purposes of the Act) without some aid in the form of price protection, must also be recognized.

The legislative intent which the Court has constantly recognized and respected, *Federal Trade Commission* v. *R. F. Keppel & Brother, Inc., supra* (see Notes 1, 2 and 3), was clearly expressed. Senator Borah in the course of the debate on June 13, 1933 (77 Congressional Record, p. 5835) interpreted the elimination from the Bill of the prohibition against price fixing by stating: "The Codes may fix prices. I say that for the reason that the clause prohibiting price fixing was stricken out." Senator Wagner said (p. 5838): "We do not want to prevent every possible thing which might be called price fixing. We all agree as to the salutary effects of prohibiting sales below the cost of production. Yet such a prohibition is certainly price fixing." See also Appendix D containing other extracts from the Congressional debates and Appendix E containing extracts from the hearings before the Congressional Committees.

In construing the Act, the entire Statute must be read as a whole. Section 4(b) of the Act contains the statement that price cutting is a definite activity that is directly contrary to the policy of the Act.

The facts and decision in *Appalachian Coals, Inc. v. U. S.*, 288 U. S. 344, foreshadowed the adoption of the Recovery legislation. The condition of ruin this Court found in the Appalachian coal industry was practically paralleled throughout all industry. Unfortunately the cooperation through self-imposed competitive regulation which the Court held permissible in that case could not be accomplished in all industries. There was the uncertainty of the anti-trust laws and how they would be applied in spite of the liberal construction that was made by this Court. This difficulty might have been overcome by the persuasion and pressure of self-preservation. The insurmountable factors, however, were the vast size of many industries and the presence in all industries of the stubborn minority whose unfair competitive tactics made it impossible for the balance of the trade to cooperate. It is this degree of aid that is supplied through the Recovery statutes and by the codes of fair competition.

It, therefore, appears that the scheme of the legislative regulation of industry becomes symmetrical and consistent when viewed in the light of past legislation and present conditions.

C. The Provisions of the Code Do Not Violate the Statutory Prohibition of Section 3A Against Monopoly and Monopolistic Practices.

Price fixing and monopoly are distinct terms and each possesses a completely individual significance. This Court by its decision in *Appalachian Coals, Inc.*, v. U. S., 288 U. S. 344, approved a cooperative association of members of an industry one of the purposes of which was to fix prices and held that it in no sense violated the prohibition contained

in the Sherman Anti-Trust Act against monopoly. The Court there stated, on pages 358 and 360:

> "The plan contemplates that prices are to be fixed by the officers of the Company at its central office. * * *"

The Court concludes:

> "'that only such contracts and combinations are within the act, as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade.'"

The term "monopoly and monopolistic practices" clearly does not embrace any of the regulations contained in Article IV of the Motor Vehicle Retailing Code. Monopoly connotes domination by a small group and centralization of control of an entire industry or an important subdivision thereof. Monopolistic practices connote oppression or control by large combinations.

The Motor Vehicle Retailing Trade comprises upwards of 30,000 dealers engaged in the sale of competitive products. The price of the new automobiles is not fixed by the Motor Vehicle dealers but by the manufacturers who publish the factory list price for each car produced. The manufacturers have complete control of the price of their products and they increase or lower prices to meet the competitive forces of fellow manufacturers. The Court has found that "the factory made prices of new cars of different makes is highly competitive." The Code imposes no requirement that compels the owner of a used car to sell it at any particular price and does not compel the dealer who becomes the owner to sell it at any particular price. It is merely a trade practice regulation that applies between a dealer and the prospective purchaser when the purchaser offers an old car as part of the consideration for the new automobile. Even if the provision of the Code might be

deemed a price fixing provision, it would be the fixing of different and varying prices for each of the numerous and distinct makes of cars sold in competition in a highly competitive market. Such prices must be instantly recognized as highly competitive and not as monopolistic prices. It is, therefore, clear that the provisions of the Motor Vehicle Code can in no sense be construed as coming under the prohibition of monopolistic practices set forth in the Act.

The legislative history of the adoption of the proviso prohibiting monopolies and monopolistic practices as a part of the National Recovery Act confirms the conclusion that the regulations here in question and even price fixing, short of monopolistic price fixing, were not prohibited by this proviso. See Appendix D (Vol. 2, pp. 42-49).

POINT IV.

THE STATE STATUTE AND THE CODE DO NOT VIOLATE THE CONSTITUTION OF THE STATE OF NEW YORK.

The questions relating to due process and delegation of power arising under the State Constitution are substantially similar in principle to those already discussed in Point II as arising under the Federal Constitution. The principal point remaining for consideration under the State Constitution is whether the State statute and the Code conflict with Section 17 of Article III of the New York Constitution. Inasmuch as a separate brief will be submitted by the Attorney General of the State of New York in which the State constitutional questions will be fully discussed, only a brief statement is made herein on that point.

While there has been no decision by the Court of Appeals, the question has been presented in a number of cases, some of which have reached the Appellate Division, and a determination of the question by the Court of Appeals may

be anticipated in the near future. The constitutionality of the State Act has been raised and determined by the Appellate Division on three occasions. *Gross* v. *Jamaica Auction Galleries, Inc.*, 242 App. Div. 658; *Sherman* v. *Abeles*, 241 App. Div. 676; and *Sabatini* v. *Andrews*, 276 N. Y. S. 502. In each and every case the Appellate Court has sustained the constitutionality of the State Act without qualification.

In *Sherman* v. *Abeles*, supra, the question "No. 5. Does Chapter 781 of the Laws of 1933 of the State of New York, violate the Constitution of the State of New York?" was certified to the Court of Appeals, but as the case was reversed on other grounds, it was not answered. *Sherman* v. *Abeles*, 265 N. Y. 383.

The case of *Darweger* v. *Staats*, 153 Misc. 522, cited and quoted by the appellant, was the decision of a Court of original jurisdiction. It is one of the very few decisions of the lower courts that has not sustained the Act. We have just been advised that the decision of the trial Court has been affirmed by the Appellate Division.

Section 17 of Article III of the New York State Constitution is not even applicable to the present case. The language of Section 17 of the State Constitution prohibits the incorporation by reference "of any existing law or any part thereof." The appellant does not contend that the Codes of Fair Competition are law. It is conceded they are not, but are regulations that "have the same force and effect as law." It is pointed out that even the Code as a regulation is not incorporated by reference. The State Recovery Act does no more than designate a single agency common to the Federal Government that may adopt rules and regulations in the form of Codes. These Codes only after their adoption by the agency may be filed under the terms of the statute.

The cases cited in the appellant's brief in support of its contention that the State Act violates Article III, Section 17

of the State Constitution in each instance limits the prohibition to the incorporation by reference to statute law.

In *People ex rel. N. Y. Electric Lines Co.* v. *Squire*, 107 N. Y. 593, at page 602:

> "The object and intent of the constitutional provision was to *prevent statute laws* relating to one subject from being made applicable to laws passed upon another subject, through ignorance and misapprehension on the part of the legislature * * *"

In *People ex rel. Commissioner* v. *Banks*, 67 N. Y. 568, at page 775:

> "The evil in view in adopting this provision of the Constitution was the incorporating into acts of the legislature by *reference to other statutes* of clauses and provisions of which the legislators might be ignorant * * *"

This applies in like manner to the citations of sister States. In the case of *State* v. *Intoxicating Liquors*, 121 Maine 483, in which the State of Maine by reference adopted the *Act of Congress* (see Appellant's Brief, bottom page 83 and 84), *Opinion of Justices*, 239 Mass. 606:

> "One distinguishing characteristic of that bill is that in several sections it incorporates by reference *laws made and to be made by the Congress* of the United States * * *"

The only additional question which arises under the State Act is whether there is any objection to the State delegating administrative powers to Federal agencies. In other words, is the New York Act invalid because the power to formulate and approve Codes to be in effect in the State of New York has been delegated to the National Recovery Administration?

The use of Federal administrative agencies to carry out the state legislative purpose would seem to be entirely

unobjectionable. The process of code adoption has been described, and shows that creation of distinct and separate agencies would involve an arduous and highly unnecessary duplication and possible confusion. The United States Supreme Court has on several occasions sustained federal legislation utilizing state agencies for its administration. See *Holmgren* v. *United States*, 217 U. S. 509. In *Arver* v. *United States*, 245 U. S. 366 at 389, the Supreme Court summarily dismissed as "too wanting in merit to require further notice" the contention that an act was void because it delegated to State officials federal power.

The final determination of whether a State statute is in accordance with the State Constitutions must be made by the highest Court of the State. *Louis K. Liggett Co.* v. *J. M. Lee, Comptroller*, decided March 13, 1933, No. 301. *Lee* v. *Bickel*, No. 44, decided May 21, 1934. *Hartford Accident & Indemnity Co.* v. *Nelson Manufacturing Co.*, 291 U. S. 352. *Glenn* v. *Field Packing Co.*, No. 541, decided December 4, 1933.

This Court has frequently stated its reluctance to pass upon such questions in advance of the decision of the highest Court of the State. *Pelton* v. *National Bank*, 101 U. S. 143. *Louisville & Nashville National Railroad* v. *Jarrett*, 231 U. S. 298. *Terrace* v. *Thompson*, 263 U. S. 197. *Porter* v. *Investors Syndicate*, 287 U. S. 346. *Carstairs* v. *Cochran*, 193 U. S. 10.

Stripped of rhetoric, the appellant places great emphasis on the penalties provided by the statute for violation of the Code in order to eloquently describe the Code as a "penal statute" and concludes that the Act violated the State Constitution as it incorporates by reference a "penal statute." The Sanitary Code, whose right to incorporation by reference is indisputable, provides punishments of imprisonment not exceeding one year "or by a fine not exceeding $2,000.00 or both." (See Sanitary Code, Section 224 and Section 1740 of the Penal Law of the State of New

York.) It appears therefore that the violation of the Sanitary Code provides penalties and punishments far more drastic than those established by the State Recovery Act for a violation of the Code of Fair Competition. It cannot be contended, therefore, that by reason of the penalties provided, the codes of fair competition are in any sense "penal statutes."

The law is well settled by the Courts of New York that only as a last resort, after exhausting every resource afforded by the canons of interpretation to save the Statute, will it be denounced by the Courts as unconstitutional. The State Courts will, in their construction, if possible, place such a meaning on the Act and the constitutional provision that both may operate in harmony. *Sage* v. *Brooklyn,* 89 N. Y. 189; *Annotations in McKinney's State Constitution; People* v. *Lorillard,* 185 N. Y. 285; *People* v. *Banks,* 67 N. Y. 568; *People* v. *Davis,* 78 App. Div. 750; Section 1210 of Article 47 of the Documentary Law. *Watkinson* v. *Hotel Pennsylvania,* 195 A. D. 624; Sections 241 to 243 of the General Business Law.

LOWER COURT DECISIONS.

The appellant refers (Brief pp. 20-23, 44-45, 52, 64-70, 77) to a number of lower court decisions which have been adverse to the regulation sought to be enforced under the National Recovery Act. Most of these adverse decisions are based upon the proposition that the particular transaction in question was not interstate commerce or did not sufficiently affect interstate commerce to be within the Federal regulatory power. A tabulation of all cases decided by the lower courts indicates clearly that the Recovery legislation and the Codes have been sustained on many more occasions than they have met defeat.

The following are examples of cases sustaining the Recovery legislation that have already been reported: *United States v. McAlister,* 8 F. (Supp.) 529; *Richmond Hosiery*

Mills v. Camp, 7 F. (Supp. 129; affirmed C. C. A., 74 Fed. (2d) 200; *U. S. v. Canfield Lumber Company*, 7 F. (Supp.) 694; *United States v. Spotless Dollar Cleaners*, 6 F. (Supp.) 725; *United States v. Schechter*, 8 F. (Supp.) 136; *United States v. French*, 9 F. (Supp.) 30; *United States v. Calistan Packers*, 4 F. (Supp.) 696; *United States v. Spissler*, 7 F. (Supp.) 123. Many additional favorable decision were issued without opinion or the opinions have not yet been reported.

As of March 2, 1935, in the Federal Courts there have been disposed of a total of 224 cases under the National Recovery Act exclusive of cases arising under section 9 thereof. Of these cases 193 were disposed of favorably to the Government and 31 unfavorably.

The cases fall into the following classifications:

Criminal cases: favorable to the Government, 31; against, 3.

Equity cases: favorable to the Government, 142 (consent decrees, 106); against, 17.

Suits by private parties: favorable to the Government, 20; against, 11.

The Motor Vehicle Retailing Code has been sustained in about sixty odd cases presented in the civil and criminal New York State Courts of original jurisdiction, more particularly in the several counties of New York, Kings, Queens, Nassau and Westchester.

Respectfully submitted,

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